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No. 82 5877

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOHNNIE L. JOHNSON,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

On Writ of Certiorari
To the Supreme Court of Georgia

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED.

1. Whether death is an unconstitutionally excessive and disproportionate penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life?

2. Whether petitioner's degree of participation in the murder was given inadequate consideration and inadequate weight by the Georgia courts, thereby violating his rights under the Eighth and Fourteenth Amendments?

3. Whether the sentencer was precluded from properly focusing on and considering petitioner's own conduct in violation of the Eighth and Fourteenth Amendments?

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Note: Citations in the text of this petition are to Ga. Code Ann., which was the official code of Georgia at the time of Johnson's trial and at the time the Supreme Court's recent opinion in his case.

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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Petitioner, Johnnie L. Johnson, prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia.

OPINIONS BELOW.

The opinion of the Supreme Court of Georgia, affirming the trial court's denial of Johnson's petition for a writ of habeas corpus, is reported at Johnson v. Zant, 249 Ga. 812 (1982). The trial court's order denying habeas corpus relief is not reported.

The opinion of the Supreme Court of Georgia on direct appeal affirming petitioner's convictions and death sentence is reported at Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978). Petitioner also filed an extraordinary motion for "extraordinary relief", the denial of which was affirmed by the Supreme Court of Georgia at Johnson v. State, 246 Ga. 474 (1980). These opinions are reproduced in the Appendix A to this petition.

JURISDICTION.

The judgment of the Supreme Court of Georgia was entered on September 10, 1982. This petition was filed within 90 days of that date.

Petitioner asserted below and asserts here a deprivation of rights secured by the Constitution of the United States. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

## CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED.

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required nor excesive fines imposed, nor cruel and unusual punishments inflicted ....

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> Nor shall any State deprive any person of life, liberty, or property without due process of law.

This case also involves the following provisions of the statutes of the State of Georgia, which are set forth in Appendix C to this brief: Ga. Code Ann. §§ 26-201,26-801,26-1101, and 27-2534.1(b)(7).

## STATEMENT OF THE CASE.

This is a death penalty case. In the judgment appealed from, the Supreme Court of Georgia granted petitioner's application for certificate of probable cause to review the trial court's decision, but affirmed the trial court's order denying habeas corpus relief.

In 1974, Johnson was convicted by a jury of the offenses of murder, rape, simple kidnapping, and aggravated assault. He received a sentence of death for the murder. The only statutory aggravating circumstance to support the sentence is Ga. Code Ann. §27-2534(b)(7), that the murder was "wantonly vile, outrageous, horrible or inhuman."

During the guilt phase of the trial, the surviving victim unequivocally stated that she never saw the murder weapon in Johnson's hand; in fact, she placed it in the hands of Johnson's co-defendant Sprouse. She also testified that there was no exchange of words or encouragement by Johnson regarding use of the gun. The evidence shows that there was no plan to murder and no way that Johnson could have anticipated that death would result from the kidnapping and rape scheme; the shooting which actually took place was sudden and spontaneous.

Johnson's jury was charged on standard "aider and abettor" language from Ga. Code Ann. §26-801, including instructions that if Johnson was to be found responsible for the murder, he must have participated through "felonious design"; the jury was also charged on intentional homicide and felony murder. During deliberations, the jury repeatedly (three times) requested to hear the testimony and charges as to responsibility of parties to a crime. However, the jury made no specific findings as to whether petitioner killed, attempted to kill, or intended to kill.

During the sentencing phase, Johnson's trial counsel did not present any evidence in mitigation of punishment, although relevant mitigating circumstances would include the relative culpability for the murder, lack of any prior record, no history of violent crimes or behavior, his age(20), and character. The jury was not specifically instructed on what to consider as mitigating evidence or the option to recommend mercy if they should find aggravating circumstances. The issue of the jury's unguided discretion was first raised in the state habeas petition. The habeas court found that these instructions, read in their entirety, could have been more "illuminating." (Order of Habeas Court §E), although the Georgia Supreme Court found adversely to petitioner on this issue, Johnson v. Zant, 249 Ga. 812(2) (1982).

Co-indictee Sprouse (the triggerman, who was tried separately) was convicted of murder, kidnapping with bodily injury, and two counts of aggravated assault; the aggravating circumstances found by the jury included both Ga. Code Ann. §25-2534(b)(2) (committed in the course of another felony) and (b)(7). His sentences were reversed in 1979 by the Georgia Supreme Court because of improper instructions on the aggravating circumstances, and again because of the trial court's exclusion certain testimony during re-sentencing in 1982.

This disproportionality issue was first raised on motion

for new trial and in the enumeration of errors to the Georgia Supreme Court on direct appeal. Again, it was raised on motion for rehearing following affirmance of the death sentence. The issue of relative culpability of a nontriggerman was not expressly ruled on by the Georgia Supreme Court until Johnson v. Zant, 249 Ga. 812(5).

REASONS FOR GRANTING THE WRIT

In this death case, the Supreme Court of Georgia granted petitioner's certificate of probable cause to appeal from the trial court's order denying him habeas corpus relief. In affirming denial of the petition for habeas corpus, the Supreme Court of Georgia decided a federal question in conflict with applicable decisions of this Court. Specifically, the Supreme Court of Georgia concluded that it is neither arbitrary, excessive nor disproportionate to impose a death sentence on one who does not fatally wield the murder weapon if the non-triggerman is present active and participating in the commission of crimes, and aiding in leaving the scene.

Petitioner urges that the holding of Enmund v. Florida, 102 S.Ct. 3368 (July 2, 1982), is applicable to the facts of this case; that the Supreme Court of Georgia relied upon petitioner's "presence" and "active participation" to reject Enmund's holding and therefore applied an incorrect standard. There was no clear finding by the trier of fact as to whether petitioner killed, intended, or attempted to kill. The factfinder was precluded from making and did not make individual considerations in mitigation, such as relative culpability, in determining sentence. The Supreme Court of Georgia, in its review, did not consider the sentence disproportionate to "similar" cases even though the triggerman, codefendant Sprouse, has no valid sentence of death.

ARGUMENT

THE GEORGIA COURTS FAILED TO GIVE ADEQUATE CONSIDERATION AND WEIGHT TO PETITIONER'S CULPABILITY AS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS

## I. INTRODUCTORY STATEMENT.

The Georgia Supreme Court rejected petitioner's argument that his death sentence was excessive and disproportionate as well as arbitrary in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution in Johnson v. Zant, 249 Ga. 812, 816(5) (1982). In deciding that Enmund v. Florida, 102 S.Ct. 3368 (July 2, 1982), was not applicable to Johnson's case, the Georgia Supreme Court found that "Johnson was not only present but active and participating throughout commission of the crimes of which he is convicted," and that the facts in Johnsons's case are "substantially dissimilar." 249 Ga. 812, at 816-7. Nowhere in the record, however, is there any finding made by the trier of fact as to whether Johnson killed, attempted to kill, or intended to kill.

The basic premise in Enmund in that the death sentence is unconstitutionally disproportionate under the 8th and 14th Amendments for a nontriggerman who "neither took life, attempted to take life, nor intended to take life." Enmund v. Florida, 102 S. Ct. at 3371-2, 3374, f. 15, 3376, 3379). The second part of the Court's holding is that the focus must be on the individual's culpability, because his culpability is different from that of a codefendant triggerman where he did not "kill or intend to kill." Id., 3372, 3377; O'Connors, J., dissenting, 3383-91.

The Florida trial court found evidence in the record to support a conclusion that Earl Enmund was an active participant in the general transaction from which death resulted. Id. 3371, f. 2; dissent, 3391, f.40. The Florida Supreme Court, however, found a supportable inference of Enmund's participation only in his staying in the getaway car to help the robbers escape during the commission of the armed robbery. Id. 3371, f. 2. The dissent also notes that Enmund located the appropriate victims three weeks before the crime, Id. 3379-80, f. 5, 3391, f. 40, Enmund v. State, 399 So. 2d at 1365; and that he actively participated in concealing the murder weapon, Id. 3380, f. 6. As to the planning

of the armed robbery, it was the prosecution's theory that Enmund in fact "had set it all up," Id. 3380, f. 7.

The Enmund decision, in presenting an analysis of the facts, repeatedly emphasizes the "kill or intend to kill" formulation, and it is this factor, rather than presence at the scene of the crime or assisting in the escape, which is relevant to the constitutional formulation, Id. 3371, f. 2. Although Enmund knew a gun would be used in the perpetration of other crimes, he did not anticipate lethal force being used in armed robberies. There was no plan to murder. Enmund did not participate in any decision to shoot the victims, and there is no way Enmund could have prevented the shooting from taking place when his codefendants decided to use the guns. Enmund v. Florida, 399 So.2d at 1369.

The critical elements of the analysis are applicable to Johnson's situation. Johnnie Johnson was a party in the general transaction from which homicide resulted but for which there was no calculation or design to take life. Johnson also knew that a gun was being used in furtherance of the kidnapping and rape. Like Enmund, there was no plan to murder, and no more foreseeability of death from the kidnapping and rape scheme than in Enmund's plot for robbing his victims by gunpoint. Johnson did not participate in any decision to shoot the victims, and the final, ultimate decision to murder the victims was made solely by Johnson's codefendant Jerry Sprouse. The shooting violence which actually occurred was sudden and unexpected.

## II. THE GEORGIA COURTS APPLY AN INCORRECT STANDARD IN DETERMINING THAT PETITIONER'S PRESENCE AND AFTER THE FACT AIDING AND ABETTING ARE THE PROPER FOCUS FOR IMPOSING THE DEATH SENTENCE.

### A. The Georgia Court has not made precise, consistent factfindings, supported by the record.

The Supreme Court concluded in the judgment below that it is neither arbitrary, excessive, nor disproportionate to impose a death sentence on one who does not fatally wield the murder weapon under circumstances where the nontriggerman is "present, active

and participating in the commission of crimes" and aiding in leaving the scene. Johnson v. Zant, 249 Ga. 812, 817 (1982).

Scrupulous reliability in factfinding should be found in a state factual determination, yet there are a number of crucial inconsistencies in the factfinding based on Johnson's record. Lockett v. Ohio, 438 U.S. 586 (1978), requires that the degree of participation in a homicide be considered in determining the proper punishment; there must be "some limit to the method by which the States assess punishment for actions less immediately connected to the deliberate taking of human life." Id. 438 U.S. at 616.

Johnson was involved in the general transaction from which homicide resulted. But the record makes very clear that there was no calculation or design by Johnson to take life, nor was there any way he could have anticipated death would result from the kidnapping and rape scheme.

The requirement that there be "accurate sentencing information [as] an indispensable prerequisite to a reasoned determination" of punishment, Gregg v. Georgia, 428 U.S. 153, at 190 (1976), cannot be ignored here. The sentencer and, more than ostensibly, the Georgia appellate courts (to avoid arbitrary and capricious results) are required to make a reliable inquiry and considered finding as to the extent of culpability and why, even if the record does not reflect the petitioner had a conscious purpose to bring about death of the victim, he is nonetheless being executed for his role in the crime. Yet this has not been done in petitioner's case.

It is perhaps most helpful to look at the testimony presented by and most helpful to the state -- the account of events given by the surviving victim, Mary Lynn Harrod. For example, while the Georgia Supreme Court finds that Johnson "intended to employ lethal force to effectuate the kidnap in rape," Id. at 817, Harrod's testimony does not support such a conclusion.

First, the unequivocal testimony of Harrod is that she never saw the murder weapon in Johnson's hand. She did not see the gun when she and her friend were smoking grass at the high school: the first time she saw it was in Sprouse's hand as he approached the women's car and told the women to accompany him (R. p.51)[1]

She placed it in Sprouse's hand from that time on: when Sprouse got in the back seat of Johnson's car with her; throughout the ride to the woods (R., p. 57); when Sprouse told the women to put their heads down (R., pp. 74, 78); as the women's hands were tied (R., p. 57); when Sprouse told Suzanne Edenfield to gag Harrod and she tried unsuccessfully to gag Suzanne (R. p.75).[2] It was still in Sprouse's hand when the car stopped in the woods and during Sprouse's attempted rape of her in the car (R. p.78).

Nor did Harrod see Johnson with the gun when he and Suzanne left and returned from the woods, when Suzanne got back in the car, when Sprouse told both women to get out of the car, or when Sprouse told them to stand on the side of the road (R. pp. 78-9). Johnson did not have the gun while Sprouse was directing Johnson to turn the car around (R. p. 79). The evidence amply authorizes a finding that Johnson never had the gun in his hand (R. pp. 74-5; 77-9; 103).

At the point precisely before the shooting, Harrod has never been able to remember who had the gun. But, she has never stated that she saw it in Johnson's hand. Her testimony has not deviated from the time of Johnson's trial in 1975 until Sprouse's resentencing in March 1982.[3] The evidence amply authorizes a finding that Johnson never had the gun in his hand (R. pp.74-5; 77-9; 103).

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[1] On direct appeal, the Georgia Supreme Court finds that "Sprouse appeared with the gun and forced the girls into the car at gunpoint," 242 Ga. at 650, while on review of the habeas proceeding, 249 Ga. at 817, the court finds: "Johnson and Sprouse forced them into Johnson's car at gunpoint" [emphasis added].

[2] On direct appeal, 242 Ga. at 650, the opinion states that both "Johnson and Sprouse bound and gagged the girls"; but it was only "Johnson who unsuccessfully tried to gag the girls" according to the review of the habeas denial, 249 Ga. at 817.

[3] In the recent decision of Sprouse v. State, Georgia Supreme Court Case No. 38822, (decided October 27, 1982), Harrod's testimony again is that Sprouse pulled the gun initially.

Second, there was no exchange of words or conversation between Johnson and Sprouse regarding use of the gun. There was, in fact, very little conversation at all: Harrod said there was no conversation during the ride, except "they asked where was Highway 80" (R., p. 54). The women asked where they were going; Sprouse replied that the "big man" wanted to talk to them (R. p. 102.)There was no conversation between anyone when the car stopped in the woods (R. p.58). Sprouse was still in the back seat and still had the gun when Johnson and Suzanne returned to the car. Sprouse then came to the back seat and told the two women to get out of the car and stand by the side of the road (R. p.61). Then, Harrod heard Sprouse direct Johnson turn the car around (R. pp. 62-3; 79; 115.) There was no conversation between Johnson and Sprouse before the shooting. Harrod stated that nothing was said that showed Sprouse, prior to the shooting, threatened the two women, cursed, or showed any emotion or anger (Sprouse T. p. 210, 222-4). The shooting violence that actually occurred was sudden.

Third, there was no encouragement by Johnson at any time for Sprouse to use the gun; in fact, Johnson had no way of anticipating that Sprouse would actually fire the gun. In the split seconds between Johnson's turning the car around at Sprouse's directions, his getting out of the car (by her version) with Sprouse ten feet away from the women and the rapid succession of shots that immediately followed, there was virtually nothing Johnson could have done to prevent the shooting.

In sum, the surviving victim's account shows no collusion, collaboration, or plan, and no conversation indicating in any way that Johnson had an intent to murder the victims or that he could anticipate Sprouse's sue of deadly force. The opinion below imputes Sprouse's actions to Johnson without any specific finding of intent to murder or to facilitate a murder.

The end result is to ignore the individual consideration required by Coker, Enmund, and Lockett: "Rape may be highly

reprehensible, but it is less than the extreme offense of murder." Coker, 433 U.S. 584, at 592 ( (1977). In Eberhart, the death sentence could not be given for simple kidnapping and an egregious rape (which involved serious injuries to the victim; see facts at Eberhart v. State, 232 Ga. 247 (1974)). Eberhart v. Georgia, 433 U.S. 917 (1977).

By definition, the crime of rape does not include death or serious injury to the person, and as Coker states:

> "it is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer as long as the rapist himself does not take the life of the victim." Coker, 97 S.Ct. at 2870 [emphasis added]

In contrast, the Georgia Supreme Court concludes that Johnsons' "active participation" in the kidnapping and rape defeats the argument that his sentence is excessive and disproportionate. Johnson v. Zant, 249 Ga. 812, 817 (1982).

Moreover, the Georgia Supreme Court finds Johnson's assistance in making a fast getaway after the murder (turning the car around) shows complicity and active participation in the murder. Id. 249 Ga. at 817. This does not make Enmund's holding inapplicable. Enmund drove the getaway car; he actively participated in concealing the murder weapons (which were never recovered) and in harboring his wounded codefendants. Enmund v. State, 399 So.2d at 1362. There was evidence that (a) Enmund had participated in a robbery and (b) helped dispose of the murder weapons after the robbery and shooting, and helped harbor the codefendants at his house. But neither Johnson's nor Enmund's after-the-fact aiding and abetting were the proper focus of their culpability for the murder itself. The main point is that Johnson's participation in a rape and his after-the-fact aiding and abetting is not enough to sustain a death sentence under Enmund's holding.

B. Death sentence cannot solely be premised on "aiding and abetting."

Enmund is not limited to the "felony murder" situation. Earl Enmund could not have been sentenced solely under the Florida felony murder statute (which applies only to triggermen) but was

found liable for first degree murder and for the death penalty also through Florida's accessorial liability rules. Id. 102 S.Ct. at 3371, Enmund v. State, 399 So.2d at 1370. In affirming Enmund's conviction and sentence of death, the Florida Supreme Court explained that "in Florida, as in a majority of jurisdictions, the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon." Id. 102 S.Ct. at 3382.

The focus of the inquiry to be made in accordance with Enmund, that is, whether the death sentence is authorized for one who did not "intend to kill or actually kill", is applicable to those instances where a state statute makes the nontriggerman "generally responsible",e.g., equally responsible, with no specific findings as to intent. Id. at 3384.

Under Georgia law, anyone who aids and abets or procures in the commission of a crime is guilty of the crime, whether or not he is present when the crime is committed. Ga. Code Ann. §26-801 (Acts 1968, pp. 1249, 1279) (emphasis added). Georgia has abolished the terminology but not the common law scope of liability regarding "principals" and "accessories" in favor of "party to a crime" which includes principals in the first degree, principals in the second degree, and accessories before the fact. Thus, anyone who is "concerned with the commission of a crime" is liable and may be punished for that crime, regardless of their presence or absence from the scene. (Committee Notes to Ga. Code Ann. §26-801, pp. 108-9, citing Perkins, Criminal Law, 570, 575 (1957)). A Georgia court has noted that "while such a result is difficult to defend as a moral principle, its legal pedigree is well established." Hannah v. State, 125 Ga. App. 596, at 598, 188 S.E.2d 401 (1972).

Section B of Ga. Code Ann. §26-801 sets out the categories of parties including (1) one who directly commits the crime (former principal in the first degree); (3) one who intentionally aids and abets in the commission of a crime (principal in the second

and abets in the commission of a crime (principal in the second degree who does not need to be actually or constructively present during the commission of the crime; (4) one who intentionally advises, encourages, hires, counsels or procures another to commit a crime (accessory before the fact who does not need to be absent during the commission of the crime. (See Committee Notes, supra.)

Under Florida's scheme, the evidence had to at least authorize a finding that Earl Enmund was constructively present aiding and abetting. His jury was charged with first and second degree liability: "first degree liability requires that while in the perpetration of the crime of robbery, the (1) defendant is actually present and (2) actively aiding and abetting the robbery; second degree liability requires that while the defendant is not physically present at the time of the crime, he did procure, counsel, command or aid." Florida Statutes § 782.04 (3)(1973) [emphasis added]. Id., 102 S.Ct. 3380, 3382 f. 16.

Enmund was liable as a principal "constructively adiding and abetting and thus guilty of first degree murder." Id., 102 S.Ct. 3372, citing Enmund v.State, 399 So.2d at 1370. Under these statutes, however, whether or not a defendant is present, the non-homicide defendant may be found equally guilty with the actual perpetrator of first degree murder. Id. 102 at 3372.

## III. THE SENTENCER WAS PRECLUDED FROM PROPERLY FOCUSING ON AND CONSIDERING JOHNSON'S OWN CONDUCT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

### A. The jury in both Enmund and Johnson were instructed on several theories of liability but no findings were required or made.

The jury in Johnson's case was instructed on several theories of liability, including aiding and abetting in an intentional homicide, malice murder, and felony murder (See Appendix B). The jury evidently was confused by the guilt phase charge, as they asked several times for clarifications on portions of the testimony concerning Johnnie's culpability and degree of participation (R., 242; 256-7; 258-9).

The jury was charged with standard "aider and abettor"

language three separate times by their own request (R., 247; 261-2, 263), and as part of that instruction, the jury was told that if Johnson was to be found responsible for the murder, he must participate through "felonious design," e.g. by the kidnapping and rape scheme. The jury was also charged on express and implied malice murder which included an explanation that an abandoned and malignant hear is "commonly evidenced by a lethal weapon and brutal use of the same" (R., p. 243). The jury under the latter theory would need to impute malice from Sprouse's lethal use of the weapon.

Of course, it is not clear which theory the jury applied since no findings as to whether Johnson himself "killed, intended to kill, or attempted to kill" are in the record. What Lockett requires is that the "focus be on his [the defendant's culpability], and not on the person who committed the robbery and shot the victims, for we insist on 'individualized considerations as a constitutional requirement in imposing the death sentence." Lockett v. Ohio, 438 U.S. 586, 605 (1978). Enmund's insistence on "a finding that the defendant had any intention of participating in or facilitating a murder" or that he "killed or attempted to kill," is based on the constitutional necessity of determining the individual culpability and conduct of a nonhomicidal felon. Enmund v. Florida, 102 S.Ct. at 3377, 3381.

Insofar as Johnson's instructions were concerned, the jury, in order to convict Johnson, needed to find nothing more than that Sprouse shot the victim and that Johnson "aid(ed) or abet(ted)" Sprouse in that crime , e.g., by disposing of clothes and the murder weapon.(R., p. 246) Or, the jury might have found that Sprouse shot the victim, but that Johnson was "presen(t during) and participat(ed) in the general transaction in which the homicide (was) committed, and "participated through a felonious design with the person killing," ie. a scheme to rape. In either case, Johnson is guilty, in terms of "his own conduct" or "his

culpability" of no more than either covering up a homicide, or participating in a rape, and is not himself guilty of taking a life or intending that it be taken.

Absent a finding that Johnnie Johnson took life or intended to take life, then Johnson, in terms of "his own conduct" or "his culpability" is at most a rapist (for whom the death sentence is an excessive penalty), and is not a murderer (for which, by itself, the death penalty would be proportionate). Id. at 3371; Coker v. Georgia, 433 U.S. 584.

Johnson's participation in the kidnapping/rape scheme and in after-the-fact aiding and abetting is not enough to sustain a death sentence, contrary to the Georgia Supreme Court's holding in Johnson v. Zant, 249 Ga. at 817. Enmund, of course, had been the one to locate the victims three weeks before the armed robbery; he drove the getaway car; he actively participated in concealing the murder weapons (which were never recovered) and in harboring his wounded codefendants. Enmund v. State, 399 So.2d at 1362. There was evidence that (a) Enmund had participated in a robbery and (b) helped dispose of the murder weapons after the robbery and shooting, and helped harbor the codefendants at his house.

In Georgia law, an accessory after the fact is a separate substantive offense punishable under Ga. Code Ann. §26-2503. The common law elements included (1) a commission of a felony by another; (2) assistance to another in an effort to avoid the consequences of the crime; (3) knowledge of the perpetrator's guilt (Committee Notes on Parties, Subsection B, pp. 107-8, citing Perkins, Criminal Law, p. 578 (1957), and former Code Ann. 26-4601). Also, Code Ann. 26-2503(b) makes it a crime to actually conceal or destroy evidence.

The jury in Johnson's case was not charged on the law of accessory after the fact. Neither Johnson's nor Enmund's after-the-fact aiding and abetting were the proper focus of

culpability for the murder itself. Moreover, both juries were instructed on several theories, including intentional homicide. Johnson's participation in a rape and his after-the-fact aiding and abetting is not enough to sustain a death sentence under Enmund's holding.

In sum, if the jury could or might have convicted the defendant based on findings that are insufficient to support a constitutional death sentence, the sentence must fall, even though it is possible the jury made the requisite finding. What Enmund requires is that the finder of fact be directed to make -- and that it does make -- a clear finding that the defendant either killed or intended to kill. That did not happen in Johnson.

2. The sentencing jury was precluded from considering mitigating factors and particular circumstances of the offense.

The Enmund majority singled out nine state murder statutes as likely to generate disproportionate death sentences under the analysis of Enmund. Id. at 3372, f. 5. Georgia's murder statute, Ga. Code Ann., is one of those. That is, Georgia is one of nine states where a defendant can be executed for an unintended felony murder if sufficient aggravating circumstances are present to outweigh mitigating circumstances. Id. at 3394. However, not even a deliberate murderer can get the death sentence in Georgia unless aggravating circumstances are found. In the instant case, the only findings the jury had to make to support the murder conviction were that of the kidnapping and rape scheme or Johnson's after-the-fact aiding and abetting the murder, neither of which alone is sufficient to support a constitutional death sentence.

But the Johnson jury did not have before them the mitigating evidence to consider Johnson's own conduct and culpability. Since no evidence was presented by Johnson's trial counsel in mitigation, his jury did not have before them the relevant factors such as his youth(21), lack of history of violence, respectable work record, and, most critically, the factors as to lesser culpability and circumstances of the offense. There was not even

a vague reference to the particulars of Johnson's character or particular circumstances as was done in Eddings v. Oklahoma, 102 S.Ct.869 (1982). The most obvious omission was not presenting Johnson's lack of a prior record of convictions, which could well have been considered by the jury in determining Johnson's predisposition to commit a violent crime in this instance.

The only "example" given in the sentencing charge of a possible mitigating circumstance was contained in a statement that counsel were permitted to present additional evidence in "extenuation, aggravation or mitigation," including a prior conviction record, pleas of guilty, or the absence thereof (R. 265). The jury was not clearly instructed on how to weigh aggravating and mitigating circumstances.

As the only "example" of a possible mitigating circumstance, of course the mitigation charge does not fit within the mandate of Lockett v. Ohio, 438 U.S. 586, at 604, 607 (1978), requiring that the sentencer consider "any of the circumstances of the offense" as an "independently mitigating factor." Nor does it meet the requirements set out in Coker v. Georgia, 433 U.S. 584, 589-90 (1977), explaining that aggravating circumstances will not justify a death sentence in a case such as Johnson's, where the penalty is disproportionate to the offense. The issue of concern is whether the jury reasonably may have believed it could not consider any factors other than a prior record or lack thereof (and of course, they did not even have the lack of prior record before them).

The habeas trial court found that the instructions on mitigation could have been more "illuminating," (Appendix B, Order of Habeas Court, SE, March 1982) but concluded that the instructions as a whole met the requirements of Spivey v. Zant, 661 F.2d 446 (11th Cir. 1982). The Georgia Supreme Court, in affirming the judgment found [illegible] jury charges constitutionally

adequate, 249 Ga. 812, 814(2) (1982), but they did not reach the question of whether a reasonable juror would have understood that relative culpability was a mitigating factor.

IV. THE EXECUTION OF JOHNSON WOULD CONSTITUTE EXCESSIVE AND DISPROPORTIONATE PUNISHMENT

The disproportionality and arbitrariness of the imposition of a death sentence in this case becomes most apparent when considered with the facts now before this Court: Johnson is not the triggerman, yet he is held under a sentence of death. There is only one aggravating circumstance supporting the death sentence, that of (b)(7). His codefendant Sprouse received two death sentences, one for murder and one for kidnapping with bodily injury, but his sentences were vacated by the Georgia Supreme Court on grounds that the jury failed to specify in writing the aggravating circumstances. Sprouse v. State, 242 Ga. 831 (1979). Upon resentencing, Sprouse again received the death sentence, which was reversed by the Georgia Supreme Court because of improper exclusion of evidence. Sprouse v. State, Georgia Supreme Court Case No. 38822 (decided October 27, 1982). The disparity in reviewing and affirming a sentence of death for the less culpable defendant while the triggerman has no valid death sentence is obvious. As the Georgia Supreme Court itself has pointed out, the evidence presented by the state in each of the cases was nearly identical. Sprouse v. State, 242 Ga. 831, 252 S.E.2d 173 (1979).

In Godfrey v. Georgia, 446 U.S. 420, 428 (1980), this Court held that "if a State wishes to authorize capital punishment it has the constitutional responsibility to tailor and apply its laws in a manner that avoids the arbitrary and capricious imposition of the death penalty"[emphasis added]. However, this case amply illustrates that the death penalty is in fact administered and applied arbitrarily and capriciously in the State of Georgia.

The Supreme Court of the United States upheld the Georgia

capital punishment statutes on their face only with the assumption that the procedures mandated by the statutes would assure that sentences of death are not wantonly or freakishly imposed. Gregg v. Georgia, 428 U.S. 153 (1976). Such a result would clearly occur here if Johnson were to be executed even though there has been no finding by the sentencer of his intention to participate in or facilitate a murder or that he killed or attempted to kill as required by Enmund v. Florida, 102 S.Ct. at 3377, 3381.

The Georgia Supreme Court has failed to follow its own precedent in affirming Johnson's death sentence. In Hill v. State, 237 Ga. 794, the evidence was uncertain as to who was the triggerman, and the evidence tended to show that the triggerman was not Hill. Nevertheless, appellant was sentenced to death and the sentence was affirmed. Affirmance of the sentence was based on the theory that Hill was the prime mover. The sentence of death was commuted to life by the Georgia Board of Pardons and Paroles. In Hall v. State, 244 S.E.2d 833 (1978), the Georgia Supreme Court reversed a death sentence for an accomplice because of its disproportionality to a life sentence received by the triggerman pursuant to a plea bargain. The evidence was clear that the codefendant had inflicted the fatal wound. Likewise, in Ward v. State, 239 Ga. 205, 236 S.E.2d 365 (1977), the Georgia Supreme Court found the death penalty disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, Ga. Code Ann. §27-2537 (c)(3), particularly in that instance where the identical facts were involved and one of the codefendants received a life sentence.

The sentence is also disproportionate because of the mandates of Coker v. Georgia, 433 U.S. 584 (1977). What Enmund does stand for is that a non-homicidal felon, for exmple a robber or rapist, may not constitutionally be sentenced to die unless his own conduct reveals some action or mental state beyond that of any robber or rapist. As to the non-homicidal felon, the fact that

identical risks fortuitously result in death in one case, but not in another, is not sufficient to impose the death sentence in one kind of felony and not another. There was no greater danger of death resulting from what Coker did (including motor vehicle theft, kidnapping, and escape), than what Johnson did (kidnapping and escape) -- but death to one of the victims occurred in Johnson's case. Executing Johnson in the absence of a jury's finding of some action or intention on the defendant's part directed at taking life would be most arbitrary and excessive. There is simply "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it is not," Godfrey v. Georgia, 446 U.S. at 433, but most notably in the case of Sprouse v. State, supra, for Sprouse has no valid sentence of death.

## V. CONCLUSION

This Court should grant Johnson's petition for writ of certiorari to review the judgment of the Supreme Court of Georgia; insofar as it leaves the sentence of death undisturbed, it should be reversed.

Respectfully submitted,

Alice C. Stewart

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(404) 881-1700

No. .....
IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JOHNNIE L. JOHNSON,

Petitioner,

vs.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served all parties to be served by depositing in the U.S. Mail with first class postage prepaid a copy of the Petition for Writ of Certiorari addressed to:

Susan V. Boleyn, Assistant Attorney General
132 State Judicial Building, 40 Capitol Square, S.W.,
Atlanta, Georgia 30334

An entry of appearance is attached hereto as Exhibit "A."

This 10th day of December, 1982.

Alice C. Stewart

ALICE C. STEWART

DECIDED SEPTEMBER 10, 1982.

Habeas corpus. Butts Superior Court. Before Judge Whitmire.

*Millard C. Farmer, Joseph M. Nursey,* for appellant.

*Michael J. Bowers, Attorney General, Daryl A. Robinson, Assistant Attorney General,* for appellee.

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## 38819. JOHNSON v. ZANT.

SMITH, Justice.

Johnnie Johnson appeals the denial of his petition for a writ of habeas corpus. Johnson is under sentence of death for murder. He received in the same trial a twenty-year sentence for kidnapping, ten years for aggravated assault, and a life sentence for rape. Appellant's convictions and sentence, including his sentence of death, were upheld on direct appeal to this court in *Johnson v. State,* 242 Ga. 649 (250 SE2d 394) (1978). Johnson also filed an extraordinary motion for "extraordinary relief," which was denied and on appeal to this court affirmed. *Johnson v. State,* 246 Ga. 474 (271 SE2d 789) (1980). Johnson's petition for a writ of habeas corpus was denied in March 1982. We granted his application for a certificate of probable cause in May 1982. We affirm.

(1) Petitioner asserts that it was error for the court below to find that Johnson received effective assistance of counsel during the guilt and the sentencing phases of his trial. The sixth amendment to the United States Constitution as applicable to the states through the due process clause of the fourteenth amendment, provides for a criminal defendant's right to effective assistance of counsel. Gideon v. Wainwright, 372 U. S. 335 (83 SC 792, 9 LE2d 799) (1963).

Nevertheless, the acknowledged constitutional right to assistance of counsel guarantees "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance." MacKenna v. Ellis, 280 F2d 592, 599 (5th Cir. 1960); *Pitts v. Glass,* 231 Ga. 638, 639 (203 SE2d 515) (1974).

We have recognized that "'decisions on which witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.'" *Reid v. State,* 235 Ga. 378, 379 (219 SE2d 740) (1975), quoting ABA Standards, relating to the Administration of Criminal Justice (1974) (ABA Standards, the

Defense Function § 5.2). We have adopted the view expressed in Brubaker v. Dickson, 310 F2d 30 (9th Cir. 1962) that the elements determining whether petitioner was afforded reasonably effective assistance of trial counsel involve: (a) whether the defendant had a defense that was not presented; (b) whether trial counsel consulted sufficiently with the accused and adequately investigated the facts and the law; and (c) whether the omissions charged to trial counsel resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy. *Hawes v. State*, 240 Ga. 327, 329-330 (240 SE2d 833) (1977).

Johnson's trial attorney was appointed shortly after his arrest and he consulted with Johnson approximately six times prior to trial to research the case and to help Johnson prepare his testimony. Examination of the trial record shows that counsel conducted an active defense by interviewing the investigating police officers, familiarizing himself with the contents of the District Attorney's file, objecting to introduction of certain evidence, cross-examining witnesses, conducting direct examination of Johnson, moving for a mistrial, and moving for a directed acquittal on the indictment charging Johnson with rape. Johnson did not aid in his defense by providing to counsel an alibi or the names of character witnesses. Counsel also filed a pre-trial petition seeking psychiatric evaluation of Johnson's competence to stand trial and general mental condition. The petition was granted and Johnson was sent to Milledgeville for testing. State psychiatrists there assessed him to be an habitual user of drugs, an habitual drinker, to have a callous attitude, and to exhibit anti-social behavior. Counsel chose not to introduce this report at trial.

During the sentencing phase counsel chose not to have Johnson testify because he feared that his client, who had testified during the guilt-innocence phase, was such a poor witness that his additional testimony would serve only to demonstrate further Johnson's lack of remorse. Counsel considered other witnesses but concluded that there was no one with knowledge of Johnson's recent history who would have been helpful. The state did not present any evidence during the sentencing phase.

After a thorough review of the record we cannot say that the decision of the habeas court is without evidence to support it or that it is clearly erroneous, and we find no merit in this enumeration of error. We hold that defense counsel's representation of the petitioner did not constitute ineffective assistance of counsel within the meaning of the sixth and fourteenth amendments. Decisions made by defense counsel such as to not present character witnesses and to not introduce psychiatric reports unfavorable to the petitioner are part

of trial tactics and strategy and thus committed to counsel's professional judgment. We do not find that counsel was inadequately prepared or that Johnson had a defense that was not presented. Johnson consulted with his attorney at least half a dozen times in preparation for trial and we hold this to be sufficient under the circumstances of this case. Examining the transcript of the trial wherein the petitioner was convicted shows that he was ably represented. The fact that Johnson's attorney chose to try petitioner's case in the manner in which it was tried does not require a finding that petitioner was unconstitutionally denied effective assistance of counsel. *Estes v. Perkins*, 225 Ga. 268 (167 SE2d 588) (1969).

(2) Petitioner urges that the death penalty was imposed unconstitutionally because the sentencing jury was prevented from considering mitigating factors. It is not argued that instruction as to mitigating circumstances was wholly lacking in the charge, but only that the jury was improperly guided as to the relationship between aggravating and mitigating circumstances. The habeas court concluded that although the trial court could have been more illuminating in its instruction on mitigation the charge as a whole met the requirements of Spivey v. Zant, 661 F2d 464 (11th Cir. 1981), and *Zant v. Geddis*, 247 Ga. 717 (279 SE2d 219) (1981).

In Spivey the court considered the requirements of the eighth and fourteenth amendments. "[T]he judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so, the judge will normally tell the jury what a mitigating circumstance is and what its function is in the jury's sentencing deliberations." Id. at 471.

In the case at hand, the trial court specifically authorized the jury to consider all evidence received in the trial and explained the concept and purpose of a mitigating circumstance. The charge was therefore constitutionally sufficient as to the consideration of mitigating circumstances. The court also charged clearly and fully enough to inform the reasonable juror that he could recommend life imprisonment even if he should find the presence of one or more of the statutory aggravating circumstances. The charge makes this option clear to the jury. *Zant v. Geddis*, supra.

We find no merit in this enumeration of error. The trial court charged properly as to consideration of mitigating circumstances and the option to recommend against death. We hold that the death penalty was not imposed contrary to the eighth and fourteenth amendments.

(3) Petitioner enumerates as error the unconstitutionally vague

and overbroad application of Code Ann. § 27-2534.1 (b) (7).[1] He argues that Godfrey v. Georgia, 446 U. S. 420 (100 SC 1759, 64 LE2d 398) (1980), requires a limiting instruction by the trial court regarding (b)(7) in order to channel the sentencer's discretion by clear and objective standards. Id. at 428. He further urges that it is impossible to objectively determine under the current standards that the jury's attention in the present case was focused on permissible considerations.

This court has recently considered the challenged statute in light of Godfrey. In *Hance v. State*, 245 Ga. 856 (268 SE2d 339) (1980) we ruled that in order for Code Ann. § 27-2534.1 (b) to be applied constitutionally in a given case, the evidence presented at trial must satisfy certain enumerated criteria as they apply to the specific factual situation of each case.

The evidence must be sufficient to satisfy the first major component of statutory aggravating circumstance (b) (7) (outrageously or wantonly vile, horrible or inhuman), and at least one of the three parts of the second component (torture to the victim or depravity of mind of the defendant or aggravated battery to the victim). *Hance*, supra, at 862-863.

The trial court in the sentencing phase of the present case instructed the jury that they were authorized to consider the death penalty if they found the following statutory aggravating circumstance beyond a reasonable doubt: "The offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

In the sentence review section of our opinion considering this case on direct appeal we concluded that the murder here was conducted in a methodical, execution-style fashion. The murdered girl's hands were bound with wire and Johnson marched her into the woods where he raped her. Johnson then brought her back to the site of his parked car where Jerry Sprouse, Johnson's co-defendant, held the second girl. The girls were stripped of their clothes and while still helplessly tied were shot at point blank range. This clearly evinced a depravity of mind on the part of the defendant and involved torture

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[1] "Mitigating and aggravating circumstances; death penalty: . . . (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: . . . (7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27-2534.1.

to the victim. In both respects it was outrageously and wantonly vile. We find that the evidence in this case supports the jury's proper finding of the necessary statutory aggravating circumstance and that Code Ann. § 27-2534.1 (b)(7) was not unconstitutionally allowed to support imposition of the death penalty.

(4) In enumeration 4 petitioner argues that the habeas court erred in declining to rule on the trial court's decision to excuse three veniremen for cause in that they did not make it unmistakably clear that they were unalterably opposed to the death penalty. We denied Johnson relief on this issue in his direct appeal. *Johnson v. State*, 242 Ga. 649, 651 (250 SE2d 394) (1978). Petitioner has made no showing why the original decision of this court should be modified. After appellate review the same issues will not be reviewed again on habeas corpus. *Zant v. Campbell*, 245 Ga. 368 (265 SE2d 22) (1980); cert. den., 101 SC 252 (1981).

(5) Petitioner claims that imposition of the death sentence was excessive and disproportionate as well as arbitrary and thus in violation of the eighth and fourteenth amendments to the United States Constitution and Georgia Code Ann. §§ 2-101 and 2-114 of the Georgia Constitution of 1976. We hold that the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases.

Petitioner urges that under the recently decided Enmund v. Florida, —— U. S. —— (102 SC 3368, 73 LE2d 1140) (1982), it is cruel and unusual punishment to impose a death sentence on one who did not kill. The record does not reveal who fired the gunshots in this case. But we do not read Enmund so narrowly as to exclude imposition of the death penalty for all but those who fatally wield the murder weapon.

In the U. S. Supreme Court's discussion of the facts of Enmund it noted that "Enmund himself did not kill or attempt to kill . . . the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder." Id. at 3377. Enmund was not present at the location where the killings took place, nor did he intend that a murder occur or that lethal force be employed in the armed robbery he anticipated would soon happen.

The facts in the present case are substantially dissimilar. The record shows that Johnson had previously described his interest in forcing women to have sex with him by frightening them with a pistol. Witnesses testified that on one occasion Johnson toyed with his gun and at the same time spoke of seizing and raping a saleswoman who came to his house soliciting magazine subscriptions.

In the case at hand, Johnson and Jerry Sprouse (who was tried separately) offered marijuana to two girls stopped at a traffic signal

next to them on a Savannah street. Agreeing, the girls led Johnson and Sprouse to a park near Savannah High School where all four smoked together for a short time. When the girls sought to leave, Johnson and Sprouse forced them into Johnson's car at gunpoint. Unlike Enmund, who proposed a plan for an armed robbery and then withdrew to assist in the escape, Johnson was continuously present and involved. As he and Sprouse carried out the abduction Johnson unsuccessfully tried to gag the girls, then warned them that if they made any noise they would be killed. At the murder site Johnson raped one girl, left her under Sprouse's guard while he turned his car around to effect a fast getaway and then rejoined Sprouse. The surviving victim testified that Johnson and Sprouse stood together only a few feet in front of her in the final moments before she and her friend were shot, although in the darkness she could not determine who held the pistol.[1]

Johnson was present at the place of the murder, intended to employ lethal force to effectuate the kidnap and rape, and aided in preparing to quickly leave the scene once the girls had been killed. It was in Johnson's car that the victims and the murder weapon were first brought together and it was in his car that Johnson threatened the girls with death if they made any noise after his failed attempt to gag them. Johnson was not only present but active and participating throughout commission of the crimes of which he is convicted, including the murder. As a result, we are not persuaded that Johnson was sentenced to death in an arbitrary fashion violative of the eighth and fourteenth amendments or Ga. Code Ann. §§ 2-101 and 2-114 of the Georgia Constitution of 1976. We do not find the sentence of death imposed here to be excessive or disproportionate to the penalty imposed in similar cases. Accordingly, we find this enumeration of error to be without merit.

(6) Petitioner claims as error the admission into evidence of incriminating statements involuntarily made by Johnson. However, petitioner does not cite to the record in his habeas corpus brief on appeal and after a thorough search we do not see that Johnson's out-of-court statements were anywhere admitted into evidence or that they were involuntary. We therefore find no merit in this enumeration.

(7) The trial court allowed two witnesses to testify over defense objection as to conversations with Johnson involving sexual fantasies and plans (none consummated) incorporating a theme of violence and forcible rape. Petitioner charges as error the admission into

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[1] See Division (3) supra, for additional facts relating to Johnson's participation in the murder.

evidence of this testimony at trial. We ruled on direct appeal of Johnson's conviction that the evidence complained of was admissible to show Johnson's bent of mind to commit such crimes. We see no reason to rule otherwise here. Once considered on appeal, the same issues will not be reviewed again on habeas corpus unless new facts have appeared or there has been a change in the relevant law. *Zant v. Campbell*, 245 Ga. 368 (265 SE2d 22) (1980), cert. den., 101 SC 252 (1981).

(8) Petitioner charges that the prosecutor made improper and inflammatory remarks in his closing argument (among them an assertion comparing Johnson's behavior to that of a mad dog) that violated Johnson's right to a fair trial, reliable sentencing determination, and due process of law. Although the order of the habeas corpus court does not specifically address this contention, we find that it is of no merit.

This court has held that flights of oratory, figurative speech, and false logic are not error requiring reversal. *Wheeler v. State*, 220 Ga. 535 (140 SE2d 258) (1965). These may include closing argument by the district attorney characterizing a defendant as a "brute, beast, an animal, and a mad dog who did not deserve to live." *Miller v. State*, 226 Ga. 730, 731 (177 SE2d 253) (1970).

Petitioner also charges that the prosecutor improperly interjected his personal belief as to proper disposition of the case during his closing. It is said that the prosecutor recommended the death penalty as the only adequate punishment for Johnson. After reviewing the record, we conclude that these remarks were not error. The district attorney was not imposing his personal opinion on the jury, but instead properly asked for the death penalty in light of the facts and circumstances as presented by the state. We find no merit in this enumeration.

(9) Petitioner argues that the court below erred in finding that the charge on reasonable doubt did not deprive appellant of a reliable guilty determination and sentencing in violation of the fifth, eighth, and fourteenth amendments. After reviewing the trial court's charge to the jury as a whole, we find no error. This court has recognized that a single instruction to the jury may not be judged in isolation, but must be viewed in the context of the overall charge. Cupp v. Naughten, 414 U. S. 141 (94 SC 396, 38 LE2d 368) (1973); *Gribble v. State*, 248 Ga. 567 (284 SE2d 277) (1981); *Wells v. State*, 247 Ga. 792 (279 SE2d 213) (1981). The charge in the instant case instructed the jury: "Every person is presumed innocent until proven guilty. No person shall be convicted of a crime unless each essential element of such crime is proved beyond a reasonable doubt. The burden rests upon the state to prove each essential element of the crime charged in

this indictment beyond a reasonable doubt. The state, however, is not required to prove the guilt of the defendant beyond all doubt or to a mathematical certainty. Moral and reasonable certainty is all that can be expected in a legal investigation." A reasonable doubt was explained to be "the doubt of a fair-minded, impartial juror honestly seeking the truth. It's not an arbitrary or a capricious doubt, but it is a doubt arising from a consideration of the evidence, from a conflict of the evidence or from a lack of evidence. If after giving consideration to all these facts and circumstances of the case, your minds are wavering, unsettled, or unsatisfied, then that's the doubt of the law and you should acquit. If that doubt does not exist in your minds as to the guilt of the defendant, then you should convict." Johnson contends that when the trial court premised reasonable doubt upon the juror's minds being "wavering, unsettled and unsatisfied" the court overstated the degree of uncertainty required for reasonable doubt. In view of these instructions as a whole and in light of our past decisions, we can only conclude that it was not error to so charge. *Payne v. State*, 233 Ga. 294 (210 SE2d 775) (1974); *Sheffield v. State*, 188 Ga. 1 (2 SE2d 657) (1939). Therefore, we find no merit in this enumeration.

(10) Petitioner urges that the court below erred in not considering that the method of imposing capital punishment by electrocution is unconstitutional in violation of the eighth and fourteenth amendments. Georgia's capital punishment statute, including the electrocution method of imposing punishment, has been held to be constitutional. Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976). Therefore, we find no merit in this enumeration.

(11) Finally, petitioner charges that he was denied a full, fair, and adequate habeas corpus hearing in Butts Superior Court because he was without funds necessary to pursue his petition. We have ruled many times that one who petitions for a writ of habeas corpus is not constitutionally entitled to funds for investigation or litigation relating to his petition. *State of Ga. v. Davis*, 246 Ga. 200 (269 SE2d 461) (1980); cert. den. 101 SC 631 (1981); *Harris v. Hopper*, 243 Ga. 244 (253 SE2d 707) (1979). Thus, we find no merit in this enumeration.

*Judgment affirmed. All the Justices concur, except Hill, P. J., who dissents.*

DECIDED SEPTEMBER 10, 1982.

Habeas corpus. Butts Superior Court. Before Judge Whitmire.

*Alice C. Stewart*, for appellant.

*Michael J. Bowers, Attorney General, Susan V. Boleyn,*

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

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|---|---|---|
| JOHNNIE L. JOHNSON, | : | |
| Petitioner | : | HABEAS CORPUS |
| | : | |
| VS. | : | NO. 5178 |
| | : | |
| WALTER D. ZANT, WARDEN GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, | : | |
| Respondent | : | |

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O R D E R

This is a death penalty habeas case. The Petitioner was convicted of the offenses of murder, rape, kidnapping, and aggravated assault. He received the death penalty for the murder conviction. Upon mandatory appeal to the Georgia Supreme Court his convictions and sentences were affirmed. Johnson v. State, 242 Ga. 649, 250 S.E. 2d 394 (1978). Petitioner's Extraordinary Motion for Extraordinary Relief was denied by the Georgia Supreme Court on August 8, 1980. The Superior Court of Chatham County set the execution for July 21, 1981. A Stay of Execution was granted in this judicial circuit by Judge Alex Crumbley on July 17, 1981. After several delays and continuances by both the State Attorney General's Office and Petitioner's Counsel, this case was heard on January 7, 1982 in Butts County Superior Court.

I.

The Court first addresses the preliminary matter of Petitioner's Motion for Funds for investigation and other purposes. It is clear that under numerous Georgia Supreme Court decisions that Petitioner in a habeas corpus is not entitled to funds from the State. Harris v. Hopper, 243 Ga. 244, 245 (1979); Pulliam v. Balkcom, 245 Ga. 99 (1980).

II.

The Petitioner has raised eight separate counts for relief in his petition. The Court will address several of these together and several will be examined separately.

FILED Mch. 21st 1982 at 4:15 P M

Audrey L. Hall CHIEF DEP. CLERK

-A-

Petitioner asserts that he has been deprived of his right to an impartial jury, in violation of the Sixth and Fourteenth Amendments to the Constitution and Article I, Section I, Paragraphs I and XI and Article I, Section II, Paragraph III of the Georgia Constitution by the exclusion for cause of three jurors expressed some equivocations regarding the death penalty. (See Petitioner's Section "C").

This issue was raised by Petitioner in his original appeal to the Georgia Supreme Court and cannot be considered in a subsequent habeas action. Johnson v. State, 242 Ga. 649, 651 (1978); Treadwell v. Hopper, 235 Ga. 242 (1975).

Petitioner asserts that the trial court erred in denying the motion for change of venue. (Petitioner's Section "B"). Again, this issue was raised in Petitioner's initial appeal to the Georgia Supreme Court and was deemed without merit. Johnson v. State, 242 Ga. 649 (7) (1978); and cannot be considered here. Treadwell v. Hooper, 235 Ga. 242 (1975).

Petitioner also contends that the sentence of death is excessive and disproportionate in violation of the Eighth Amendment to the United States Constitution as incorporated through the Fourteenth Amendment. (Petitioner's Section "F"). This issue was presented to the Georgia Supreme Court and that Court ruled adversely to Petitioner's position. Johnson v. State, 242 Ga. 649, 656 (1978). This Court is bound by that decision.

Petitioner asserts that the trial court's application of Ga. Code Ann. §27-2534.1 (b)(7) was overbroad and vague in violation of the Eighth and Fourteenth Amendments. (Petitioner's Section "H"). Again this issue was raised in the initial appeal and cannot be raised here. Johnson v. State. 242 Ga. 649, 656 (1978); Treadwell v. Hopper, supra.

For the above reasons all of these contentions are without merit.

-B-

The main thrust of Petitioner, as with all habeas corpi cases, is that he was denied his right to effective counsel during and before

his trial. The Petitioner sets forth twelve instances of the alleged ineffectiveness of trial counsel.

The proper test for determining the effectiveness of counsel is that of "counsel reasonably likely to render and rendering reasonably effective assistance." Pitts v. Glass, 231 Ga. 638 (1974); United States v. Gibbs, 662 F.2d 725 (11th Cir. 1991). After reviewing the pertinent portions of the record involving the alleged instances of ineffectiveness, the Court concludes that under the standard set out above the allegation of ineffectiveness is without merit.

-C-

Petitioner urges this Court that the trial Court's charge during the guilt/innocent phase regarding the explanation of reasonable doubt. However, after reviewing the trial court's charge as a whole, the Court finds that the instructions on reasonable doubt were sufficient to inform the jury on this requirement. (T. 244).

This ground is without merit.

-D-

Petitioner contends that the admission of evidence of specific acts of misconduct violated the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Although the admission of this evidence was perhaps err, it is not of such a nature as to affect the overwhelming evidence of guilt introduced by the State.

This ground is without merit.

-E-

Petitioner asserts in paragraph 11 of the petition that the trial Court failed to adequately charge the jury in regard to their duty of determining whether aggravating circumstances were proved and whether any factors in mitigation were demonstrated. (T. 266-269).

Specifically, Petitioner objects to the trial Court's over-emphasizing the element of aggravating circumstances and also the failure of the trial Court to clearly instruct the jury that they could recommend mercy even if aggravating circumstances were presented. After reviewing the trial Court's charge at the punishment phase, this Court

concludes that although the trial Court could have been more illuminating in its instruction on mitigation (in particular, the failure to specifically state that the jury could recommend life even if aggravating circumstances were found) the charge as a whole meets the requirements of Spivey z. Zant, 661 F.2d 446 L 11th Cir. 1981); Gaddis v. Zant, 247 Ga. 717 (1981).

This ground is without merit.

Accordingly, the Petition for Writ of Habeas Corpus is hereby denied.

SO ORDERED, this the 25th day of March, 1982,

SAM L. WHITMIRE
JUDGE, SUPERIOR COURT
FLINT JUDICIAL CIRCUIT

## 33826. EDMONDS v. CITY OF ALBANY.
## 33827. HOMER v. CITY OF ALBANY.

MARSHALL, Justice.

The appellants were convicted in recorder's court of violation of a municipal ordinance of the City of Albany, Code 1963, § 16-6, which provides, "No person shall wilfully fail or refuse to comply with any lawful order or direction of a police officer." On writ of certiorari to the Superior Court of Dougherty County, the convictions were affirmed, giving rise to the present appeal.

1. The attack in recorder's court on the constitutionality of the municipal ordinance on the ground that it is void and in violation of Art. I, Sec. IV, Par. I of the Georgia Constitution of *1945* (Code Ann. § 2-401), is treated as properly raising the issue with respect to Art. I, Sec, II, Par. VII of the *1976* Constitution (Code Ann. § 2-207), the wording of which is identical to that in the 1945 Constitution. See *Lambert v. City of Atlanta*, 242 Ga. 645 (2) (1978).

2. The ordinance is subject to the appellants' constitutional attack. The State of Georgia has preempted the field in this respect by the enactment of Code Ann. § 26-2505 (Ga. L. 1968, pp. 1249, 1313): "Any person who knowingly and wilfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor." In *Wooten v. State*, 135 Ga. App. 97 (1) (217 SE2d 350) (1975), the Court of Appeals held that the defendant's wilful failure or refusal to comply with a lawful order or direction of a police officer (the conduct prohibited by the municipal ordinance in question) constituted a violation of Code Ann. § 26-2505, supra. See *Lambert v. City of Atlanta*, supra, (4), and cits. In the case sub judice, similarly to the situation in *Lambert*, there has been no legislative authorization for municipalities to enact ordinances proscribing the conduct within the purview of Code Ann. § 26-2505, supra.

*Judgment reversed. All the Justices concur, except Jordan and Bowles, JJ., who dissent.*

SUBMITTED JULY 14, 1978 — DECIDED NOVEMBER 21, 1978.

Failure to obey a police officer; constitutionality of ordinance. Dougherty Superior Court. Before Judge Kelley.

*Young & Associates, Sharon L. Tucker,* for appellant.

*James Davis,* for appellee.

*Hinson McAuliffe, Solicitor, Charles Hadaway, Assistant Solicitor,* amicus curiae.

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## 33755. JOHNSON v. THE STATE.

MARSHALL, Justice.

The appellant, Johnny L. Johnson, was convicted of murder, rape, kidnapping, and aggravated assault in the Chatham Superior Court. He received the death penalty for the murder conviction, a life-imprisonment sentence for the rape conviction, a 20-year sentence for the kidnapping conviction, and a 10-year sentence for the aggravated-assault conviction. His case is here on direct appeal and for mandatory review of the death sentence imposed.

*I. Summary of the Evidence*

In July of 1974 the appellant Johnson was stationed at a military base in Beaufort, S. C. He and Jerry Sprouse were in Savannah on the evening of July 20, 1974. They were going to attend a rock concert at the Savannah Civic Center, but they were unable to obtain tickets. Suzanne Edenfield and Mary Lynne Harrod had attended the rock concert. They were driving down Victory Drive when they were approached by two white males, Johnson and Sprouse, in a "cream colored car." The driver, Johnson, asked the girls if they wanted to stop and smoke a joint (marijuana). The girls responded affirmatively, and the parties proceeded in their respective cars to Savannah High School. They parked the cars there, and the girls joined Johnson and Sprouse in Johnson's car. The girls remained in that car for approximately 15 minutes, during which time they smoked a couple of joints of marijuana. They then informed Johnson and Sprouse

that they had to leave, and they returned to their own car.

As Suzanne was starting the car, Sprouse appeared with a gun and forced the girls into the back seat of Johnson's car. Sprouse got into the back seat also, and Johnson drove the group down Highway 17 South. Johnson and Sprouse bound and gagged the girls and drove them to a wooded area off Highway 17. Once there, Johnson left the car with Suzanne and raped her. Sprouse attempted to have sexual intercourse with Lynne in the back seat of Johnson's car, but he was unable to consummate the act. Johnson returned to the car with Suzanne, and he proceeded to partially disrobe her. Lynne was completely nude at this time. Both girls were still bound. Johnson then ordered the two girls to stand over "off the side of the road." Johnson then got into the car and turned it around. He then got out of the car and stood next to Sprouse. Lynne next heard a gunshot ring out, and she then saw Suzanne fall to the ground. That gunshot fatally wounded Suzanne. Another gunshot hit Lynne, wounding her, but not fatally.

Johnson and Sprouse took the car and abandoned and burned it in a wooded area in South Carolina. However, the car was not completely destroyed, and it was found by law enforcement authorities and traced to Johnson. Johnson and Sprouse fled to Canada. They later returned to the Savannah area, and Johnson was apprehended in a laundromat in South Carolina.

At trial, Johnson contended that Sprouse was the active perpetrator of the crimes and that he, Johnson, had gone along with Sprouse only because Sprouse was in possession of the gun. He maintained that it was Sprouse who had shot the girls. He contended that he had not had sex with Suzanne Edenfield, but this contention was contradicted by the presence of male sperm found in her vagina.

After reviewing the record, we conclude that the evidence presented at trial fully authorized the jury in finding that Johnson and Sprouse were equally involved in the commission of these crimes. Accordingly, we hold that the trial court did not err in overruling the appellant's motion for new trial.

*II. Enumerations of Error*

1. In Enumeration of error 1, the appellant argues that imposition of the death penalty pursuant to Code Ann. § 27-2534.1 (b) (7) (Ga. L. 1973, pp. 159, 163) constitutes cruel and unusual punishment because neither the court nor the jury is given standards to determine whether the offense for which the death penalty is being given is "outrageously or wantonly vile, horrible, or inhuman[e] in that it involved torture, depravity of mind, or an aggravated battery to the victim."

This same argument was made and rejected in Gregg v. Georgia, 428 U. S. 153, 201 (96 SC 2909, 49 LE2d 859) (1976). In Gregg, the Supreme Court of the United States noted that the language in this statutory aggravating circumstance need not be construed in an overly broad fashion. In *Harris v. State*, 237 Ga. 718, 732-733 (230 SE2d 1) (1976), this court held that it would restrict its approval of the death penalty under this statutory aggravating circumstance to those cases that clearly fall within its ambit. Recognizing the possibility of abuse of this statutory aggravating circumstance, the court in *Harris* held that it had no intention of permitting it to become a "catchall" for cases simply because no other statutory aggravating circumstance is raised by the evidence.

Enumeration of error 1 is therefore without merit. Enumerations of error 4 and 5 are also controlled adversely to the appellant under our ruling in this division.

2. In Enumeration 2, the appellant argues that the trial court erred in excusing veniremen Bryan, Coleman, and Henry for cause in that they did not make it unmistakably clear that they were unalterably opposed to the death penalty. Witherspoon v. Illinois, 391 U. S. 510 (88 SC 1770, 20 LE2d 776) (1968).

Upon being individually questioned on voir dire, Bryan, Coleman, and Henry did make it unmistakably clear that they would vote against the death penalty regardless of what transpired at trial, as required by Witherspoon and its progeny before prospective jurors can be excused for cause.

At the beginning of voir dire examination, the court

clerk asked the entire traverse jury panel if anyone was conscientiously opposed to the death penalty, as permitted by *Arnold v. State*, 236 Ga. 534 (6) (224 SE2d 386) (1976). Neither Bryan, Coleman, nor Henry responded affirmatively to this question. Later on voir dire, when being individually questioned, these prospective jurors stated that they had misunderstood the question. After indicating upon being questioned individually that they were unalterably opposed to the death penalty, these prospective jurors were properly excused for cause. This enumeration of error is without merit.

3. In Enumerations 3, 8 and 13, the appellant contends that the trial court erred in allowing the state to place his character in issue by introducing evidence of specific acts of misconduct unrelated to the charges against him.

Witness Lilly testified that Johnson had told him, approximately one month before the crimes in this case were committed, that he and Sprouse had been riding around Beaufort, S. C., and that they had seen different girls coming in and out of the different clubs in and around town. Johnson told Lilly that he and Sprouse were thinking of "going out and seeing if they could find some of those girls to take out and see how much they could get out of them." Johnson also told Lilly that, "if they didn't want to do what he told them to, they were going to force them." Lilly also testified that he saw Johnson waving a pistol around, stating that as long as he had the pistol he could do what he wanted.

Witness Yawn testified that approximately one month before the crimes in this case were committed, a female magazine salesman came to his house in Beaufort, S. C., while Johnson was present. He testified that Johnson had suggested that they rape her.

The general rule is that evidence of independent crimes is inadmissible at the trial of the crime charged, even though it be a crime of the same sort. *Bacon v. State*, 209 Ga. 261 (71 SE2d 615) (1952). However, evidence of the other crime is admissible if some logical connection can be shown between it and the crime charged from which it can be said that proof of one tends to establish the

other, other than by merely showing the bad character of the accused. *Bacon v. State*, supra. Evidence of independent crimes has been admitted for the purpose of showing, among other things, motive, plan, scheme, bent of mind, and course of conduct. See, e.g., *Hicks v. State*, 232 Ga. 393 (207 SE2d 30) (1974); *McNeal v. State*, 228 Ga. 633 (187 SE2d 271) (1972); *Allen v. State*, 201 Ga. 391 (40 SE2d 144) (1946). The exception to the general rule that evidence of independent crimes is inadmissible has been most liberally extended in the area of sexual offenses. *Jessen v. State*, 234 Ga. 791 (218 SE2d 52) (1975); *Burnett v. State*, 234 Ga. 741 (218 SE2d 4) (1975); *Hunt v. State*, 233 Ga. 329 (211 SE2d 288) (1974); *Dorsey v. State*, 204 Ga. 345 (49 SE2d 886) (1948).

The complained-of evidence did not show that the defendant had committed other rapes, but rather the evidence showed a bent of mind on the part of the defendant to commit such crimes. In the present case, the fact that the defendant was a participant in the crimes charged was undisputed, the critical issue being whether or not his participation was voluntary. His bent of mind to commit rape showed the likelihood that he would voluntarily participate in a scheme to kidnap and rape the two victims and, for this reason, became highly relevant. Therefore, the trial court did not err in admitting the complained-of evidence. This enumeration of error is without merit.

4. In Enumeration 6, the appellant argues that it was error for the trial court to allow the state to use the statutory aggravating circumstance that "the offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman[e] in that it involved torture, depravity of mind, or an aggravated battery to the victim," Code Ann. § 27-2534.1 (b) (7), to support imposition of the death penalty for both rape and murder.

This enumeration of error is without merit for several reasons. First, the appellant did not receive the death penalty for rape. Second, even if the appellant had received the death penalty for rape, a defendant who has been found guilty of committing two capital felonies can receive the death penalty for both of them on the ground

that they both were "outrageously or wantonly vile, horrible or inhuman[e] in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Moore v. State*, 240 Ga. 807 (243 SE2d 1) (1978).

The appellant's reliance on *Gregg v. State*, 233 Ga. 117, 127 (210 SE2d 659) (1974) is misplaced. What that decision holds is that if one crime, i.e., robbery, is used as the statutory aggravating circumstances to support imposition of the death penalty for another crime, i.e., murder, then the murder can not then be used as the statutory aggravating circumstances to support imposition of the death penalty for the armed robbery.

5. In Enumeration 7, the appellant complains that instead of giving the jury written instructions on mitigating and aggravating circumstances as required by Code Ann. § 27-2534.1 (c), the trial court gave the jury "possible verdicts in writing."

Looking to the trial court's instructions to the jury during the presentence hearing, we find that the jury was properly instructed on mitigating and statutory aggravating circumstances, under *Spivey v. State*, 241 Ga. 477 (246 SE2d 288) (1978). The "possible verdicts in writing" were given to the jury to aid it in designating whether its verdict was to be a recommendation of death and, if so, what statutory aggravating circumstances had been found beyond a reasonable doubt. This enumeration of error is without merit.

6. In Enumeration 10, the appellant argues that since the jury did not find him guilty of kidnapping with bodily injury, it was precluded from finding him guilty of murder, rape, and aggravated assault.

What the appellant's argument overlooks is that he was only indicted for simple kidnapping. His conviction for that offense was in no way inconsistent with the finding by the jury that after the appellant kidnapped the victims, he raped and murdered one of them and committed an aggravated assault upon the other. This enumeration of error is without merit.

7. In Enumeration 11, the appellant contends that the trial court erred in overruling his motion for change of venue due to adverse pre-trial publicity.

Code Ann. § 27-1201 (Ga. L. 1972, p. 536) provides for

a change of venue in a criminal case whenever an impartial jury cannot be obtained or there is a probability or danger of violence. The question as to whether venue should be changed addressed itself to the sound discretion of the trial court. E.g., *Coleman v. State*, 237 Ga. 84 (226 SE2d 911) (1976).

As stated in Irvin v. Dowd, 366 U. S. 717 (81 SC 1639, 6 LE2d 751) (1961), the test for determining whether adverse pre-trial publicity has so affected the community that the defendant cannot receive a fair trial is whether the prospective jurors summoned to try the case can lay aside their impressions and opinions and render a verdict based on the evidence presented at trial. Looking to the voir dire record of examination, we cannot say that an unbiased and impartial jury was not selected to try the case. We conclude that the trial court did not abuse its discretion in overruling the motion for change of venue. This enumeration of error is without merit.

8. In the final enumeration of error, the appellant argues that the trial court erred in allowing in evidence photographs of the victim and extended autopsy testimony. These are matters lying within the discretion of the trial court (*Avery v. State*, 209 Ga. 116 (70 SE2d 716) (1952)), and under the circumstances of this case we find no abuse thereof.

*III. Sentence Review*

In reviewing the death sentence imposed in this case, we are required by Code Ann. § 27-2537 (c) (Ga. L. 1973, pp. 159, 165) to consider three questions:

First, we must determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." Code Ann. § 27-2537 (c) (1). After reviewing the transcript and record, we conclude that it was not.

Second, we must consider whether the evidence supports the jury's finding of statutory aggravating circumstances. Code Ann. § 27-2537 (c) (2). In this case, the jury imposed the death penalty based on the finding that the murder was "outrageously or wantonly vile, horrible or inhuman[e] in that it involved torture, depravity of mind, or an aggravated battery to the victim." Code Ann. § 27-2534.1 (b) (7).

The murder in this case was conducted in a methodical, execution-style fashion. The victim was disrobed at the time of the murder, and she had her hands tied behind her back. The murder itself was preceded by the rape of the victim. This clearly evinced a depravity of mind on the part of the defendant and involved torture to the victim. In both respects, it was outrageously and wantonly vile. The evidence supports the jury's finding of this statutory aggravating circumstance, and the verdict is factually substantiated.

Third, we must determine whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Code Ann. § 27-2537 (c) (3).

In reviewing the death sentence in this case, we have considered cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed, and we find that the similar cases listed in the appendix support the affirmance of the death penalty in this case.

*Judgment affirmed. All the Justices concur.*

ARGUED JULY 11, 1978 — DECIDED OCTOBER 17, 1978 — REHEARING DENIED NOVEMBER 21 AND DECEMBER 5, 1978.

Murder. Chatham Superior Court. Before Judge Oliver.

*William P. Franklin, Jr., Stephen H. Harris,* for appellant.

*Andrew J. Ryan, III, District Attorney, Robert M. Hitch, III, Assistant District Attorney, Arthur K. Bolton, Attorney General, Susan V. Boleyn, Assistant Attorney General,* for appellee.

APPENDIX.

*House v. State,* 232 Ga. 140 (205 SE2d 217) (1974); *Gregg v. State,* 233 Ga. 117 (210 SE2d 659) (1974); *Floyd v. State,* 233 Ga. 280 (210 SE2d 810) (1975); *Moore v. State,* 233 Ga. 861 (213 SE2d 829) (1975); *Mitchell v. State,* 234 Ga. 160 (214 SE2d 900) (1975); *Jarrell v. State,* 234 Ga. 410 (216 SE2d 258) (1975); *Berryhill v. State,* 235 Ga. 549 (221 SE2d 185) (1975); *Goodwin v. State,* 236 Ga. 339 (233 SE2d 703) (1976); *Dobbs v. State,* 236 Ga. 427 (224 SE2d 3) (1976); *Pulliam v. State,* 236 Ga. 460 (224 SE2d 8) (1976);

*Gibson v. State*, 236 Ga. 874 (226 SE2d 63) (1976); *Corn v. State*, 240 Ga. 130 (240 SE2d 694) (1977); *Moore v. State*, 240 Ga. 807 (243 SE2d 1) (1978); *Davis v. State*, 241 Ga. 376 (247 SE2d 45) (1978); *Green v. State*, 242 Ga. 261 (1978).

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34041. COOK v. THE STATE.

HILL, Justice.

Joe B. Cook was found guilty of murder of his wife and was sentenced by the court to life in prison. One of his enumerations of error warrants discussion. He contends that it was a violation of Code Ann. § 59-718.1 to permit the jury to disperse during the presentation of the state's case in chief at the sentencing trial in this capital case.

The district attorney had given notice of aggravating circumstances and thus had given notice of the state's intention to seek the death penalty. However, when the jurors returned their verdict finding the defendant guilty, they were polled and then dismissed without a death sentencing trial. The court imposed the life sentence. It is not clear from the transcript at what point the state decided not to seek the death penalty. We therefore assume for purposes of this appeal that at the time of jury dispersal during presentation of the state's case the state was still seeking the death penalty.

A capital crime is one for which the death penalty may be imposed. Our Code law continues to prescribe that the death penalty may be imposed for some crimes (e.g., armed robbery, rape, kidnapping with bodily injury) which constitutional decisional law prescribes that the death penalty cannot be imposed where no death results. Coker v. Georgia, 433 U. S. 584 (97 SC 2861, 53 LE2d 982) (1977); *Collins v. State*, 239 Ga. 400 (2) (236 SE2d 759) (1977).

This difference between what the Code prescribes and the Constitution allows has created some confusion. We have held as follows:

(1) Convictions of rape, armed robbery and

A. (cont'd) that seeing how I was implicated in the crime itself that nobody would believe what I had to say.

Q. Did you ever go to the police?

A. No, sir; I did not.

Q. One more time, Mr. Johnson; when those two girls got into your car and Jerry got in there with that gun, you were going to get sex either voluntarily or by force; is that correct?

A. Yes, sir.

MR. RYAN: You can come down.

(NOTE: The defendant withdrew from the stand.)

THE COURT: We'll take a ten minute recess.

(NOTE: A ten minute recess was taken after whichthe following transpired:)

THE COURT: Yes, sir.

THE JUROR: Judge, I'd like to hear the last question and the last answer read back.

THE COURT: Would you read it back to us please, ma'am?

COURT REPORTER: "One more time; when those two girls got in your car and Jerry got in there with that gun you were going to get set either voluntarily or by force, is that right?" "Yes, sir."

THE COURT: All right.

MR. RYAN: He hasn't rested yet.

MR. FRANKLIN: We rest, Your Honor.

MR. RYAN: The State closes.

(NOTE: Following closing arguments of counsel, the Court charged the jury as follows:)

THE COURT: Ladies and Gentlemen of the Jury, you are trying the case of the State against Johnny L. Johnson, who is charged in Case No. 23,141 with kidnapping and Case No. 23,41 with aggravated assault, and Case No.--let me start that

THE COURT: (cont'd) over--23,141 with kidnapping, Case No. 23,413 with aggravated assault, Case No. 23,144 with rape, and Case No. 23,145 with murder. This, of course, is in the Superior Court of Chatham County, and these indictments state in substance that Johnny L. Johnson did unlawfully abduct and steal away certain persons, to-wit; Suzanne Edenfield and Mary Lynn Harrod without lawful authority and warrant and did unlawfully hold the said Suzanne Edenfield and Mary Lynn Harrod against their will, contrary to the laws of the State of Georgia, the good order, peace and dignity thereof.

And then it is charged that Johnny L. Johnson did on the 21st day of July, 1974 unlawfully assault Mary Lynn Harrod by shooting the said Mary Lynn Harrod with a deadly weapon, to-wit; a pistol, contrary to the laws of the State of Georgia, the good order, and peace and dignity thereof.

And then it's charged that Johnny L. Johnson did on the 21st day of July, 1974 unlawfully have carnal knowledge of Suzanne Edenfield, a female, forcibly and against her will, contrary to the laws of the State of Georgia, the good order, and peace and dignity thereof.

And then that Johnny L. Johnson did on the 21st day of July, 1974, unlawfully and with malice aforethought, cause the death of Suzanne Edenfield, a human being, by shooting the said Suzanne Edenfield with a pistol contrary to the laws of the State of Georgia, the good order, and peace and dignity thereof.

The defendant is on trial for alleged offenses set forth in four different indictments. You must consider

THE COURT: (cont'd) each indictment separately in reaching your verdict, deciding each on the evidence sibmitted as to whether the defendant is guilty or not guilty.

The defendant has entered a plea of not guilty, thereby denying each and every essential of the crime stated in the indictment. Neither the indictment nor the plea of not guilty form the issues which you are to determine.

Every person is presuemd innocnet until proved guilty. No person shall be convicted of a crime unless each essential element of such crime is proved beyond a reasonable doubt. The burden rests upon the State to prove each essential element of the crime charged in this indictment beyond a reasonable doubt. The State, however, is not required to prove the guilt of the defendant beyond all doubt or to a mathematical certainty. Moral and reasonable certainty is all that can be expected in a legal investigation.

A reasonable doubt means just what it says. It is the doubt of a fair-minded, impartial juror honestly seeking the truth. It's not an arbitrary or a capricious doubt, but is a doubt arising from a consideration of the evidence, from a conflict of the evidence or from a lack of evidence. It after giving consideration to all the facts and circumstances of the case, your minds are wavering, unsettled, or unsatisfied, then that's the doubt of the law and you should acquit. If that doubt does not exist in youf minds as to the guilt of the defendant, then you

THE COURT: (cont'd) should convict.

You are the sole judges of the facts, the truthfulness of the witnesses and the weight of the evidence. To weigh the evidence, you must consider the believability of the witnesses. You will apply the test of truthfulness which you apply to your daily lives. These tests include the demeanor of each witness upon the stand, his manner of testifying, the reasonableness of the testimony, the opportunity he had to see, hear and know things concerning which he testified, his accuracy of memory, his frankness or lack of it, his intelligence, interest and bias, if any, together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign to the testimony of each witness such weight as you deem proper. You may believe or disbelieve all of any part of the testimony of any witness. It is your duty to determine what testimony is worthy of belief and what testimony is not worth of belief.

Now, what is evidence? Evidence is all the testimony received from the witnesses, the exhibits admitted during the trial, and any facts agreed to by counsel. Evidence may be either direct or circumstantial or both. Direct evidence is the testimony given by a witness who has seen or heard the facts to which he testifies. It includes exhibits admitted into evidence during the trial.

Evidence may also be used to prove a fact by inference. This is referred to as circumstantial evidence. Circumstantial evidence is the proof of facts or circumstances by direct

THE COURT: (cont'd) evidence from which you may infer other related or connected facts which are reasonable and justified in the light of your experience. Circumstantial evidence along will not justify a finding of guilty unless the circumstances are entirely consistent with the defendant's guilt and wholly inconsistent with any reasonable theory of the defendant's innocence, and are so convincing as to exclude a reasonable doubt of the defendant's guilt.

I charge you that where facts in evidence and all reasonable deductions therefrom present two theories, one of guilt and the other consistent with innocence, the justice and humanity of the law compel the acceptance of the theory which is consistent with innocence.

Now, evidence does not include the indictment, opening statements or closing arguments of counsel, it does not include answers to questions and statements of counsel that you've been instructed to disregard.

Now, every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of the commission of the crime. A person is concerned in the commission of a crime only if he directly commits the crime or, two, intentionally causes some other person to commit the crime under circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity, or, three, intentionally aids or abets in the commission of the crime, or, four, intentionally advises, encourages, hires, counsels, or procures another to commit the crime.

A party to a crime who did not directly commit the

PARTIES

THE COURT: (cont'd) crime may be indicted, tired, convicted, and punished for the commission of the crime upon proof that the crime was committed and that he was a party thereto although the person claimed to have directly committed the crime has not been prosecuted or convicted or has been convicted of a different crime or a degree of crime or is not amenable to justice or has been acquitted.

I charge you that the mere presence and participation in the general transaction in which a homicide is committed is not conclusive evidence of the consent and concurrence in the perpetration of the crime by a defendant sought to be held responsible for the homicide unless such defendant participated through felonious design with the person killing The mere presence of the defendant at the scene of the crime, if any, at the time of its perpetration would not be sufficient to convict the defendant of the crime.

Now, Ladies and Gentlemen, the law permits witnesses who have had special training and knowledge and experience in certain lines to give their opinions as experts based upon their knowledge of particular matters. The weight which is to be given the opinions of expert witnesses is for you to decide. You can accept it and act on it or you can reject it and then act on your own judgment as you apply it to the evidence in this case.

Voluntary intoxication by the use of alcohol, drugs, or narcotics is no excuse for crime. The fact that one accused of a crime was under the influence of alcohol,

THE COURT: (cont'd) drugs, or narcotics at the time of alleged crime may be shown as illustrative of his motive in the transaction, but when one voluntarily under the influence of alcohol, drugs, or narcotics is presumed to intend the legitimate consequences of his act. And the question is whether he intended to do the act or whether he intended the consequences of the act. When a person under the influence of alcohol, drugs, or narcotics is sufficiently intelligent to know or understand and intend to do a certain act and understand that certain consequences are likely to result from it and does the act, he is criminally liable for the consequences of his act. However, if because of the influence of alcohol, drugs, or narcotics, one's mind becomes so impaired as to render him incapable of forming an intent to do the act charged or to understand that a certain consequence would likely result from it, he would not be criminally responsible for the act. Whether or not that is true is a question for the jury to determine.

I charge you, Ladies and Gentlemen, that a person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against her will. If the jury should believe beyond a reasonable doubt that the defendant did unlawfully, willfully, knowingly abduct or steal away the person named in the indictment without lawful authority or warrant, and did hold said person or persons against their will or her will, the jury would be authorized to convict the

THE COURT: (cont'd) defendant of kidnapping. If the jury should determine that the defendant is gulity of the offense of kidnapping, it should consider further if the person kidnapped shall have--or persons kidnapped shall have received bodily injury during the kidnapping. And if that be the opinion of the jury they should return that in addition to the guilt or lack of guilt of the defendant concerning the kidnapping.

In other words, if you find the defendant guilty of kidnapping, you shall then consider whether ir not the person kidnapped or persons kidnapped shall have received bodily injury during the kidnapping.

A person commits aggravated assault when he assaults with the intent to murder or t orape or to harm. The defendant is on trial for aggravated--a person commits aggravated assault when he assaults with a deadly weapon. Whether or not a given instrument is a dealy weapon is in every instance a question for the jury to be determined by them. If you believe from the evidence beyond a reasonable doubt that the defendant made an assault upon the person named in the indictment with a pistol and that said pistol was a deadly weapon, that it was an assault without justification, mitigation, or excuse, then you'd be authorized to find the defendant guilty of aggravated assault with a deadly weapon.

If the jury should not believe the defendant guilty of the offense of aggravated assault or should entertain a

THE COURT: (cont'd) reasonable doubt as to his guilt of the offense, the jury would qcquit so far as the charge of aggravated assault is concerned. Then the jury would determine whether the defendant is guilty of the lesser offense, simple assault and battery of simple assault or simple battery.

A person commits simple assault when he either attempts to commit a violent injury to the person of another or commits an act which places another in the reasonable apprehension of immediately receiving any violent injury. A person commits simple batter when he either intentionally makes a physical contact of an insulting or provoking nature with the person of another or intentionally causes physical harm to another.

Rape is the carnal knowledge of a femal forcibly and against her will. In other words the defendant is charged with having sexual intercourse with the female in this case forcibly and against her will. The State must prove beyond a reasonable doubt that there was a penetration of the female sex organ by the male sex organ. It is sufficient to constitute the act of intercourse whether ihis penetration be slight or great, but there must be penetration.

I charge you further that the State must likewise prove beyond a reasonable doubt that the act of sexual intercourse, if any, was established by force and against the will and without hhe consent of the femal alleged to have been raped. Ordinarily, if the female alleged to have been raped consents to the act of sexual intercours, it is not rape. If her consent is obtained by fear, or she

THECOURT: (cont'd) did not resist owing to the fact of threats or violent, bodily harm made by the defendant and she was in fear of her life or in fear of great bodily harm and her power to resist was broken down, and under these circumstances the defendant obtained and had sexual intercourse, with the female, then you may consider whether or not sexual intercourse under those circumstances would be rape.

I charge you that force is a necessary element of the crime of rape but it may be exerted not only by physical violence but also by threats of serious, bodily harm which overpower the female and cause her to yeild against her will.

The testimony of a single witness is generally sufficient to establish a fact, but there are certain exceptions to this rule and this case presents one of such exceptions. It is the law that the jury can not convict the defendant of the offense for which he is on trial, that is rape, by the unsupported testimony of the female alleged to have been raped. Before you'd be authorized to convict the defendant, there must be other evidence independent of hers sufficient to connect the accused with the offense charged. All the evidence taken together must convice your minds beyond a reasonable doubt of the guilt of the accused. It is for the jury to determine whether the female alleged to have been raped has been so corroborated or not. It is not necessary that the corroborating evidence, if any,

THE COURT: (con'td)should if itself be sufficient to show the defendant's guilt beyond a reasonable doubt. The jury would be authorized to convict the defendant if they are satisifed of his guilt beyond a reasonable doubt from all the evidence; that of the female alleged to have been raped and the corroborating evidence, if any, taken together.

On the question of corroboration, you may look to all the facts and circumstances of the case and see if the female in this case made outcry at the time of the alleged act, if one was committed, and whether she made a report or complaint soon thereafter, whether or not her clothes were torn, disarranged or the body of her person bruised or bleeding, or her private parts or clothes injured or bloody, of if there was a struggle; and then determine whether or not her testimoy has been corroborated sufficiently to convince your minds beyond a reasonable doubt of the guilt of the accused.

A person commits--if you decide that rape was not perpetrated, then you would consider the matter of assault with intent to rape. A person commits aggravated assault when he assaults with an intent to murder or to rape or to rob. The defendant--you can consider if the defendant here is guilty of aggravated assault with the intent to rape if you do not believe that the rape was perpetrated.

I charge you that a person commits rape when he has carnal knowledge of a female forcibly and against her will. Now, carnal knowledge and rape occurs when there is any penetration of the female sex organ by the male.

THE COURT: (cont'd) sex organ. If the jury should believe beyond a reasonable doubt that the defendant did assault the person named in the indictment and that such assault was with the intent to commit rape upon such person, then the jury would be authorized to convict the defendant or assault with intent to rape. Of course, you can't convict the defendant of both rape and assault iwth intent to rape, as one is a lesser included offense of the other.

Another charge against this defendant is murder. A person commits murder when he unlawfully and with malice aforethought, either express or implied causes the death of another human being. Express malice is the deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Implied malice may exist when there may be no evidence of express malice, but it may be implied. Implied malice, says the law, is where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. An abandoned and a malignant heart, in the sense of the law, is commonly held to be evidenced by a weapon likely to produce death and by a brutal and bloody-thirsty use of the same. Whether or not a given intrumant in a weapon likely to produce death when used in the manner in which it was used is in every instance a question for the jury.

THE COURT: (cont'd) If the jury should believe beyond a reasonable doubt that the defendant caused the death of the person named in the indictment in the manner therein alleged that the killing was intentional and unlawful and with malic aforethougt and without justification, mitigagation or excuse, then in that event, the jury would be authorized to find the defendant guilty of murder.

If the jury should not believe the defendant guilty of murder or should entertain an reasonable doubt as to his guilty of murder, the jury would acquit the defendant insofar as the charge of murder is concerned.

Now, again, Ladies and Gentlemen, be sure that you completely and fully understand. Let me call to your attention that you are trying, as I have stated, and as I have previously stated, the defendant is on trial for the alleged offenses as set forth in four different indictments. You must consider each indictment separately in making your verdict, deciding each on the evidence sibmitted as to whether the defendant is guilty or not guilty, and you bring back four separate and distinct verdicts, considering each separately.

I charge you that if you believe beyond a reasonable doubt that the defendant did, in this county, commit the crimes as charged of kidnapping, aggravated assault, rape, and murder, remembering again considering each separately as charged in separate Bills of Indictment, then you would be authorized to find the defendant guilty of that crime, considering each separately, the crime in each indictment.

THE COURT: (cont'd) I charge you if you have a reasonable doub t that the defendant is guilty of the crimes ... charged, it would be your duty to give him the benefit of the doubt and find him not guilty.

END

Now, remember again, there are four indictments and you're to consider them each separately.

Should you find the defendant not guilty, as I have charged, you'd be authorized to consider under the evidence whether or not he did at the same time and place commit the lesser offenses that I have charged.

At this time it is your sole responsibility to determine the guilt or innocense of the defendant, considering all the evidence presented to you and the law as given you in charge by the court. Your duty at this time is confined to the determination of guilt or innocnece of the defendant on each indictment.

If you find the defendant not guilty, that would terminate your consideration and in such event, the form of your verdict would be, "We, the jury, find the defendant not guilty." And you would specify it separately on each indictment.

If you were to find the defendant guilty of the lesser crime as charged, you should so state.

Whatever your verdict is, let it be agreed upon by all twelve of you, let it be entered in ink on the back

IND

THE COURT: (cont'd)

of each indictment separately, let each of them be dated, let each of them be signed by one of you as foreman or forelady. Then you will return into court for the publication of your verdict.

You may now retire and consider your verdict..

(NOTE: The jury retired, was sent to lunch, and began its deliberations at 2:40 p.m. Thereafter, at 4:50 p.m., the jury requested to hear certain portions of the testimony, as follows:)

THE COURT: Mr. Foreman, can I be of assistance?

THE FOREMAN: Yes, sir. We would like the playback of the testimony of both Johnny Johnson and Miss Harrod as to the turning around of the automobile and who was where.

(NOTE: The following portion of Miss Harrod's testimony was replayed for the jury:)

"Q. All right. At that time, could you tell whether it was a paved road or a dirt road?

"A. A dirt road.

"Q. All right, the area that was there to move the car around in - you say Johnson turned the car around? Did anyone direct him in turning the car around?

"A. Sprouse did.

"Q. And when the car was turned around, did Johnson remain in the car?

"A. No, sir.

"Q. What did he do?

"A. He got out.

"Q. At that time, did you see who had the gun?

"A. No, sir.

"Q. Do you know who had the gun?

"A. No, sir.

"Q. All right; when Johnson got back out of the car, where did he go?

"A. Stood right beside Sprouse.

"Q. All right. Now, if I'm Suzanne and you're you, were they standing in front of you, beside of you, or in back of you?

"A. In front of us.

"Q. And approximately how far away were they from you all?

"A. From me to him.

"Q. To this gentleman right here or the gentleman in the polk-a-dot shirt?

"A. Yes, sir.

"Q. Were they directly in front of - - -

"A. Directly in front.

"Q. Now, as they were standing up there, did they say anything to you all?

"A. No.

"Q. Did you hear either Johnson say anything to Sprouse or Sprouse say anything to Johnson?

"A. No, sir.

"Q. What is the next thing that you heard?

"A. A gunshot.

"Q. And when you heard the gunshot, what did you do?

"A. I turned my head.

"Q. When you turned your head, what way did you turn your head?

"A. To the left.

"Q. You turned around and you did that and what did you see when you turned your head?

"A. Suzanne was falling."

(NOTE: The following portion of the direct testimony of Johnny Johnson was reread to the jury:)

"Q. Did you turn the car around?

"A. Yes, sir, I did.

"Q. And what happened, what did you see after you turned the car around?

"A. Well, as soon as I got the car turned around, I came - I pulled it back up to about when to where they were standing, maybe a little bit further on, and as soon as I turned the car around, Jerry shot the two girls and ran around the car and got in and we drove off."

"Q. Did you get out of the car?

"A. No, sir, I did not.

"Q. Did this - what did you do when you saw and heard these two shots?

"A. Well, I got sick in my car, sir."

(NOTE. The following portion of Johnny Johnson's testimony on cross-examination was reread to the jury:)

"Q. When you brought Suzanne back to the car and you took her clothes off, whose idea was it to stand them up on the side of the road?

"A. Jerry's. He told me to get in the car and turn it around and told them to stand to the other side of the car out of the way while I turned the car around.

"Q. When you turned the car around, you brought the car back up here; is that right?

'A. Yes, sir." //

THE FOREMAN. Could you clarify on the charge for aggravated assault, please?

THE COURT: A person commits aggravated assault when he assaults with a deadly weapon. Whether or not a given instrument is a deadly weapon is in every instance a question for the jury, to be determined by them. If you believe from the evidence beyond a reasonable doubt that the defendant made an assault upon the person named in the indictment with a pistol and that said pistol was a deadly weapon, that it was an assault without justification, mitigation or excuse, then you would be authorized to find the defendant guilty of aggravated assault with a deadly weapon.

If the jury should not believe the defendant guilty

THE COURT: (cont'd)

of the offense of aggravated assault or should entertain a reasonable doubt as to his guilt of the offense, the jury would acquit so far as the charge of aggravated assault is concerned. Then the jury would determine whether the defendant is guilty of the lesser offense of simple assault or simple battery.

A person commits simple assault when he either attempts to commit a violent injury to the person of another or commits an act which places another in the reasonable apprehension of immediately receiving any violent injury. A person commits simple battery when he either intentionally makes a physical contact of an insulting or provoking nature with the person of another or intentionally causes physical harm to another.

THE FOREMAN: Is there another section on that?

THE COURT. I charged rape and then aggravated assault by attempting to rape. Is that what you had in mind?

THE FOREMAN: Maybe it's the one on the murder charge.

THE COURT: A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is the deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Implied malice may exist when there may be no evidence of express malice, but it may be implied. Implied malice, says the

THE COURT: (cont'd)

law, is where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. An abandoned and malignant heart, in the sense of the law, is commonly held to be evidenced by a weapon likely to produce death and by a brutal and bloodthirsty use of the same. Whether or not a given instrument is a weapon likely to produce death when used in the manner in which it was used is in every instance a question for the jury.

If the jury should believe beyond a reasonable doubt that the defendant caused the death of the person named in the indictment in the manner therein alleged, that the killing was intentional and unlawful and with malice aforethought and without justification, mitigation or excuse, then in that event the jury would be authorized to find the defendant guilty of murder.

If the jury should not believe the defendant guilty of murder or should entertain a reasonable doubt as to his guilt of murder, the jury would acquit the defendant insofar as the charge of murder is concerned.

THE FOREMAN: Is there a section that deals with the association of the parties?

THE COURT: Yes, sir. I charge you that every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of the commission of the crime. A person is concerned in the commission of a

THE COURT: (cont'd)

crime only if he directly commits the crime or, two, intentionally causes some other person to commit the crime under circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity, or three, intentionally aids or abets in the commission of the crime, or four, intentionally advises, encourages, hires, counsels or procures another to commit the crime.

Any party to a crime who did not directly commit the crime may be indicted, tried, convicted, and punished for the commission of the crime upon proof that the crime was committed and that he was a party thereto, although the person claimed to have directly committed the crime has not been prosecuted or convicted or has been convicted of a different crime or a degree of crime or is not amenable to justice or has been acquitted.

I charge you that the mere presence and participation in the general transaction in which a homicide is committed is not conclusive evidence of the consent and concurrence in the perpetration of the crime by a defendant sought to be held responsible for the homicide unless such defendant participated through felonious design with the person killing. The mere presence of the defendant at the scene of the crime, if any, at the time of its perpetration would not be sufficient to convict the defendant of any crime.

You may now retire, and continue your deliberations.

(NOTE: The jury returned to the juryroom; Counsel for the State and the Defense stated that they had no objections to the recharge. At 7:00 p.m., the jury was sequestered for the evening, with instructions by the Court, to return on Friday morning at 9:00 a.m. to continue their deliberations. Following assembly of the jury, the following transpired:)

THE FOREMAN: Judge, if it's not too much of an imposition, the third charge you read us the second time, do you have it handy?

THE COURT: I have it handy. The question is, which one is that?

THE FOREMAN: That's the association of the parties to a crime. It's still not clear in some of our minds, the wording of it.

THE COURT: I charge you that the mere presence and participation in the general transaction in which a homicide is committed is not conclusive evidence of the consent and concurrence in the perpetration of the crime by a defendant sought to be held responsible for the homicide unless such defendant participated in the felonious design with the person killing. Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of the commission of the crime.

A person is concerned in the commission of a crime

THE COURT: (cont'd)

only if he one, directly commits the crime or, two, intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity, or three, intentionally aids or abets in the commission of the crime, or four, intentionally advises, encourages, hires, counsels, or procures another to commit the crime.

Any party to a crime who did not directly commit the crime may be indicted, tried, convicted, and punished for the commission of the crime upon proof that the crime was committed and that he was a party thereto, although the person claimed to have directly committed the crime has not been prosecuted or convicted or has been convicted of a different crime or a degree or crime or is not amenable to justice or has been acquitted.

The mere presence of the defendant at the scene of the crime, if any, at the time of its perpetration would not be sufficient to convict the defendant of any crime.

THE FOREMAN: Thank you, sir.

(NOTE: The jury thereafter retired for further deliberation and at 11:10 a.m. returned to the courtroom with verdicts of guilty as charged on Indictments 23,141; 23,144; 23,143; 23,145. By direction of the Court, a verdict of not guilty

PART 15
3 TIMES

(NOTE: (cont'd) was entered on the indictment charging the defendant with aggravated assault by attempting to rape. Thereafter, a conference was held between the Court and Counsel and the following then transpired:)

THE COURT: Members of the Jury, in two of these indictments, one kidnapping, you have found him guilty as charged, and not with injury having occurred after the kidnapping, therefore, the sentence is within the perogative of this Court as to sentence. The aggravated assault does not carry the death penalty and is within the perogative of the Court to sentence.

Members of the Jury, you having returned a verdict of guilty in these cases, at this time the Court will resume the trial of this case for the purpose of conducting a presentence hearing, the only issue to be determined by the jury shall be the punishment to be imposed by you, the jury.

In this presentence hearing, Counsel for both sides will have the right to present to the jury additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions, pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any such prior criminal convictions or pleas.

Upon the completion of the introduction of such

THE COURT: (cont'd)

evidence, each party shall then have a right to present their summation regarding punishment to be imposed.

Proceed for the State.

MR. RYAN: We have no additional evidence other than what has been presented.

THE COURT: Proceed for the defense.

MR. FRANKLIN: We have no additional evidence to present, Your Honor.

(NOTE: Following closing arguments by Counsel, the Court charged the jury as follows:)

THE COURT: Ladies and Gentlemen of the Jury, the defendant in this case has been found guilty of the offenses of murder and of rape. It is now your duty to determine within the limits prescribed by law the penalty which shall be imposed as punishment for that offense.

Under the law of this State, every person found guilty of murder shall be punished by death or imprisonment for life. Everyone found guilty of the offense of rape shall be punished by death or by imprisonment for life or by imprisonment for not less than one nor more than twenty years.

I charge you that in arriving at your determination, you must first determine whether at the time the crime was committed the following aggravated circumstance existed beyond a reasonable doubt: The offense of murder

THE COURT: (cont'd)

was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim.

If you find that this aggravated circumstance existed beyond a reasonable doubt, then you would be authorized to consider imposing a sentence of death. If you do not find that these aggravated circumstances existed beyond a reasonable doubt, then you would not be authorized to consider the penalty of death. In that event, the sentence would be imprisonment for life in the murder case, or imprisonment for life or twenty years in the rape case.

In arriving at your determination of what sentence is appropriate, you are authorized to consider all the evidence you received here in Court presented by the State and the defendant throughout the trial before you. You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation.

Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.

Aggravated circumstances are those which increase the guilt or enormity of the offense or add to its injurious consequences.

THE COURT: (cont'd)

Now, Ladies and Gentlemen, the form of your verdict fixing punishment should be one of the following: "We, the Jury, find the following statutory aggravated circumstance against the defendant: The offense of murder was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim, and we fix the punishment at death."

Two, "We, the Jury, find the following statutory aggravated circumstance against the defendant: The offense of murder was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim, and recommend mercy for the defendant."

Three, "We, the Jury, find that no statutory aggravated circumstances existed beyond a reasonable doubt."

Now, Ladies and Gentlemen, the form of your verdict fixing punishment as to rape would be, "We, the Jury, find the following statutory aggravating circumstances against the defendant: The offense of rape was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim, and we find the punishment of the defendant at death."

Two, "We, the Jury, find the following statutory

THE COURT: (cont'd)

aggravating circumstances against the defendant: The offense of rape was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim, and recommend mercy for the defendant."

Or, "We, the Jury, find that no statutory aggravated circumstances existed beyond a reasonable doubt." You may suggest, if you care to, the punishment of from one to twenty years.

If you should find aggravating circumstance or circumstances and not recommend mercy, then the defendan will be put to death by electrocution. If you should find aggravating circumstances or circumstance and recommend mercy, the defendant will be sentenced to life imprisonment.

If you should find no aggravating circumstance or circumstances, the defendant in the murder case will be sentenced to life imprisonment and will be sentenced to one to twenty years as set by you or as set by you in the matter of rape.

Your decision must be unanimous, it must be in writing, and the entire decision must be entered on the indictment in this case, dated, and signed by the foreman whom you shall select. You will be given possible verdicts in writing for your assistance.

You may now retire and consider your verdicts.

In the Supreme Court of Georgia Decided: OCT 27 1982

38822. SPROUSE v. THE STATE.

GREGORY, Justice.

This is the second appearance of this death penalty case. Appellant was convicted of murder, kidnapping with bodily injury, and two counts of aggravated assault. He was sentenced to death for murder and kidnapping with bodily injury and to ten years for each of the aggravated assaults. We affirmed appellant's convictions but remanded the case to the trial court for a new trial on the sentences to be imposed for murder and kidnapping with bodily injury. Sprouse v. State, 242 Ga. 831 (252 SE2d 173) (1979). On remand, the state did not seek the death penalty for kidnapping with bodily injury. A sentencing trial was conducted, before a jury, as to the murder, and the death penalty was again imposed. The case is here on direct appeal and for mandatory review of the death penalty. Code Ann. § 27-2537 (a).

The evidence presented by the state showed that appellant and his co-defendant, Johnson,[1] approached

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[1] See Johnson v. State, 242 Ga. 649 (250 SE2d 394) (1978).

Suzanne Edenfield and Mary Lynne Harrod (now Burke) after a rock concert and asked them if they wanted to smoke marijuana. They did, and the four proceeded in separate cars to Savannah high school, where they smoked some marijuana in Johnson's car. Approximately 15 minutes later, the girls attempted to leave but were prevented from doing so at gunpoint. They were taken, in Johnson's car, to a secluded, wooded area. Johnson left the car with Suzanne and raped her. Appellant attempted to rape Lynne. Johnson returned, and the girls were lined up and shot. Lynne survived. Suzanne was killed.

The sentencing trial was conducted under the Georgia Unified Appeal procedure. Accordingly, we have reviewed the entire record of the case pursuant to Rule IV (B) (2).[2] See Code Ann., Appendix to ch. 27-25. We find it necessary to address a matter not enumerated as error.

Lynne testified for the state at the sentencing trial. She stated on direct examination that she and the others had smoked, altogether, two or three joints (marijuana cigarettes) between the four of them. Afterwards, she and Suzanne started to leave. When they did, appellant pulled a gun and made them get in the back seat of Johnson's car. Appellant got in the back seat with them and Johnson drove. At some point during the trip, appellant tied Lynne's hands behind her and Johnson tied Suzanne's hands behind her. Suzanne was forced to

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[2] "The Supreme Court shall review each of the assertions of error timely raised by the defendant during the proceedings in the trial court regardless of whether or not an assertion of error was presented to the trial court by motion for new trial, and regardless of whether error is enumerated in the Supreme Court."

tie a kerchief around Lynne's mouth. Another kerchief was tied around Suzanne's mouth.

On cross examination, Lynne testified that she had smoked marijuana prior to the night of the murder and that two or three joints was not a lot of marijuana to be smoked by four people. She was asked if she had not testified in "police court" on August 8, 1974, that the four of them had smoked at least three joints apiece. At first she answered that she could not remember. Later she flatly denied making the statement.

Subsequently, defense counsel asked if Suzanne, and not Johnson, had driven Johnson's car. Lynne answered in the negative. Then she was asked if she recalled telling Sergeant Burkhalter that Suzanne actually drove the car. She did not deny making such a statement, but could not recall it.

After the state rested, appellant called Sergeant (now Lieutenant) Burkhalter to the stand. Appellant directed Burkhalter's attention to an interview he had conducted with Lynne three days after the murder. The state objected, on the ground that any statement Lynne made at that time would be hearsay.

The jury was removed and the admissibility of Burkhalter's testimony was considered outside the jury's presence. Appellant's attorney stated to the court that he intended to prove by Burkhalter's testimony that Lynne had previously stated that Suzanne had driven. The state responded that since Lynne did not deny making the previous statement, it was not admissible to impeach her testimony and was therefore inadmissible hearsay. The trial court agreed and sustained the objection.

While still outside the presence of the jury, the trial court considered the admissibility of the testimony of two additional witnesses that appellant intended to call. Appellant's attorney stated to the court that he intended to call the court reporter who had transcribed the police court hearing to prove that Lynne had stated under oath that the four had smoked at least three joints apiece. He further intended to call a medical doctor to testify to the effect of smoking that amount of marijuana. The trial court ruled the testimony of both witnesses inadmissible.

Code Ann. § 38-1803 states in part: "A witness may be impeached by contradictory statements previously made by him as to matters relevant to his testimony and to the case." "In order to impeach a witness by contradictory statements, it is not necessary that he should absolutely deny the declarations made by him; but this may be done when the witness says he does not recollect such statements, if the same be relevant to the issue on trial." Estill v. Citizens and Southern Bank, 153 Ga. 618 (3) (113 SE 552) (1922). The trial court erred in refusing to allow appellant to impeach Lynne's testimony simply because she failed to deny making her former statements.[3]

Moreover, in Gibbons v. State, 248 Ga. 858 (286 SE2d 717) (1982), decided shortly before the sentencing trial,[4] we held that a prior inconsistent statement of

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[3] Assuming that she failed to deny making them. In our view of the testimony, she did deny ever testifying that they smoked at least three joints apiece.

[4] Gibbons was decided February 3, 1982. The sentencing trial was conducted on March 22, 23 and 24, 1982.

a witness who takes the stand and is subject to cross-examination is not hearsay, but is admissible as substantive evidence. Thus, not only were Lynne's prior inconsistent statements admissible to impeach her credibility, they were admissible as substantive evidence of the facts contained therein.

Had the jury been presented with the evidence excluded by the trial court, it might have concluded, not only that Lynne's testimony was not as reliable as it seemed to be, but also that appellant's conduct was not as aggravated as her in-court testimony indicated. The jury's consideration of the circumstances of the crime and the defendant was therefore incomplete. See Horton v. State, Ga. (6) ( SE2d ) (Case No. 38570, decided September 8, 1982).

We are unable to say that the erroneous exclusion of Lynne's prior inconsistent statements and the testimony of the doctor was harmless. This case must again be remanded to the trial court for a new trial as to sentence.

Judgment reversed. All the Justices concur, except Jordan, C. J. and Smith and Weltner, JJ. dissent.

claimed by Mrs. Bryan to be a contributing cause to their separation within the meaning of the statute, and that such continuing conduct on his part prevented the reconciliation she had desired. This evidence was, therefore, not irrelevant.

4. The trial court's failure to apply the 1977 alimony statute was an error which was not rendered harmless merely because the jury gave her alimony in some amount. In seeking a favorable award, she was entitled to present the evidence in question to the jury, and she was erroneously denied that right. She is entitled to a new trial.

5. The last issue concerns the correctness of the trial court's ruling that at trial Mr. Bryan might not be asked by Mrs. Bryan's attorney whether he had committed adultery.

Code § 38-1603 allows a party to be a witness for himself on all relevant issues; but Code § 38-1606 creates an exception for proceedings "instituted in consequence of adultery," with the result that in such proceedings a party is not competent to testify to his own or his spouse's adultery. Our question is whether this lawsuit for alimony following a no-fault divorce should be considered a proceeding "instituted in consequence of adultery" when Mrs. Bryan seeks to prove that Mr. Bryan's adultery was the cause of their separation. The cases indicate "yes." *Lowry v. Lowry*, 170 Ga. 349, 358 (153 SE 11)(1930); *Boone v. Boone*, 225 Ga. 610, 611 (170 SE2d 414)(1969).

The trial court did not err in disallowing this question.

The trial court did err, however, in overruling Mrs. Bryan's new trial motion.

*Judgment reversed. All the Justices concur.*

ARGUED OCTOBER 10, 1978 — DECIDED JANUARY 5, 1979.

Divorce, etc. Fulton Superior Court. Before Judge Blackshear, Senior Judge.

*Westmoreland, Hall, McGee, Warner & Oxford, Edward E. Bates, Jr., Harry P. Hall, Jr.*, for appellant.

*Hurt, Richardson, Garner, Todd & Cadenhead, Emily S. Bair, A. Paul Cadenhead*, for appellee.

## 34245. SPROUSE v. THE STATE.

JORDAN, Justice.

Jerry Sprouse was convicted of murder and kidnapping with bodily injury and two counts of aggravated assault. He was sentenced to death for murder and kidnapping with bodily injury and ten years each for the aggravated assaults. His case is here on direct appeal of the convictions and mandatory review of the death sentences imposed.

A co-indictee, Johnny L. Johnson, was convicted of the same murder and was sentenced to death in addition to a life sentence for rape, a twenty-year sentence for kidnapping and a ten-year sentence for aggravated assault. These convictions and the death sentence of Johnson were affirmed in *Johnson v. State*, 242 Ga. 649 (1978).

The evidence in Sprouse's trial was essentially the same as that in Johnson's trial. Briefly stated, the evidence shows that two young girls were kidnapped, lined up while bound and nude, and shot in the head at point blank range by Sprouse and Johnson. One of the girls had been raped and an attempted rape made on the other. One of the girls survived the gunshot wounds and testified at the trial. For additional facts see *Johnson v. State*, supra.

1. On December 2, 1978, pending this appeal, Sprouse escaped from the Chatham County Jail and has not been recaptured. Based on the escape the state has made a motion to dismiss Sprouse's appeal, citing *Griffin v. State*, 239 Ga. 795 (239 SE2d 16) (1977) and relying on *Mosley v. State*, 189 Ga. 71 (5 SE2d 47) (1939), the latter case decided under the prior death penalty statute.

The present death penalty statute provides that when the "death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia." Code Ann. § 27-2537 (a) (Ga. L. 1973, p. 159). The statute further provides that "the sentence review shall be in addition to direct appeal, if taken, and the review and appeal *shall* be consolidated for consideration. The Court *shall* render its decision on *legal errors enumerated, the factual substantiation of the verdict, and the va-*

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*lidity of the sentence.*" Code Ann. § 27-2537 (i). (Emphasis supplied.)

This statutory language mandates a review in death penalty cases of enumerations of error dealing with the conviction of the appellant as well as a review of the sentence imposed. The motion to dismiss is denied. See *Dean v. State*, 242 Ga. 508 (1979).

2. In his second enumeration, the appellant alleges: "The trial court erred in denying Plaintiff's Motion for Mistrial upon the introduction of the testimony of a witness relating to conversation of a co-defendant out of the presence of this defendant. Said testimony by a witness, James Gregory Yawn, related to a conversation of the co-defendant with an unnamed girl, approximately a month prior to the alleged murder under the guise that the defendant and the co-defendant entered into a conspiracy to commit the crimes for which the defendant was tried. Said testimony was highly inflammatory, prejudicial and constituted error."

Two weeks prior to the crime, the witness Yawn heard Johnson and the appellant talking about "strong-arming" and raping girls. Johnson was doing the talking and the appellant was agreeing with him.

Yawn also started to testify concerning the statements Johnson made on one occasion when a magazine sales girl came to the house that were along the same line. We are not called upon to rule on the admissibility of these statements inasmuch as the trial court instructed the jury to disregard any statement made by Johnson when appellant was not present.

The other conversations reported by Yawn where the appellant was present and agreed with Johnson establish a conspiracy to commit rape and having been made during the pendency of the conspiracy were admissible against the appellant. Code Ann. § 38-306; *Birt v. State*, 236 Ga. 815 (225 SE2d 248) (1976); *Reaves v. State*, 242 Ga. 542 (3) (1978); *Orkin v. State*, 236 Ga. 176 (233 SE2d 61) (1976). The trial court restricted the admissibility of Yawn's testimony to those times when the appellant was present and did not err in refusing to grant a mistrial inasmuch as any harmful testimony was corrected by proper instructions to the jury. *Woods v. State*, 233 Ga. 495, 498

(212 SE2d 322) (1975). This enumeration is without merit.

3. Appellant's fifth enumeration of error alleges "The court erred in allowing the surviving victim to testify as to the extent of her disability over the objection of defendant's attorney. Said testimony was inflammatory, prejudicial and constituted error."

The appellant was charged with aggravated assault with a deadly weapon of Mary Lynn Harrod. Code Ann. § 26-1302 provides: "A person commits aggravated assault when he assaults (a) with intent to murder, to rape, or to rob, or (b) with a deadly weapon." The indictment charged that the indictees "did unlawfully assault Mary Lynn Harrod by shooting the said Mary Lynn Harrod with a deadly weapon, to wit: a pistol."

We note the appellant's objections were directed only to prejudice and not admissibility, and therefore the issue is one of relevancy. The injuries sustained in an aggravated assault are relevant to that assault and therefore admissible. Code Ann. § 38-201. "The Georgia courts have said many times that relevant evidence is not subject to an objection that it might inflame the minds of the jury or prejudice the jury and this is true even where the offered evidence is only cumulative . . . The Georgia rule favors the admission of any relevant evidence, no matter how slight its probative value." Agnor's Georgia Evidence, § 10-2, p. 165. *Avery v. State*, 209 Ga. 116 (70 SE2d 716) (1952); *Toler v. State*, 213 Ga. 12 (96 SE2d 593) (1957); *Blount v. State*, 214 Ga. 433 (105 SE2d 304) (1958).

The trial court restricted the testimony to present condition resulting from the assault and limited speculation as to future progression. We find no abuse of the trial court's discretion in the admission of this testimony.

4. Our disposition of the death sentences in this case make it unnecessary to address the other enumerations of error relating to the convictions.

5. Appellant alleges error "in that the jury had failed to designate in writing . . . an aggravating circumstance upon which the jury based the death penalties" as specifically required by statute. We agree that this is a fatal flaw in the verdict.

The trial court did not hold a pre-sentence hearing at which both sides are permitted to present evidence in aggravation, extenuation and mitigation as provided in Code Ann. § 27-2503. Neither the defense nor the prosecution waived these procedures. Failure to follow the mandate of § 27-2503 is neither harmless nor waived by failure to object to procedure. *Bailey v. State*, 138 Ga. App. 807 (227 SE2d 516) (1976).

Under these circumstances, the pre-sentence proceedings were invalid and the case must be returned to the trial court for a new trial on the question of sentence under appropriate pre-sentence proceedings and proper instructions to the jury. *Miller v. State*, 237 Ga. 557, 559 (229 SE2d 376) (1976).

The judgment of convictions and sentences is affirmed except the two death sentences imposed. The case is remanded to the trial court for a new trial on the sentences to be imposed for murder and kidnapping with bodily injury.

*Judgment affirmed in part, reversed in part, and remanded. All the Justices concur.*

ARGUED NOVEMBER 20, 1978 — DECIDED JANUARY 5, 1979.

Murder, etc. Chatham Superior Court. Before Judge Oliver.

*Reginald C. Hauptt, Jr.*, for appellant.

*Andrew J. Ryan, III, District Attorney, Robert M. Hitch, III, Assistant District Attorney, Arthur K. Bolton, Attorney General, Harrison Kohler, Assistant Attorney General*, for appellee.

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## 34323. EVANS et al. v. JUST OPEN GOVERNMENT (JOG) et al.
## 34324. TINGLE et al. v. JUST OPEN GOVERNMENT (JOG) et al.
## 34325. McGARITY et al. v. JUST OPEN GOVERNMENT (JOG) et al.

MARSHALL, Justice.

Plaintiff, Just Open Government (JOG), an unincorporated association of citizens, taxpayers, voters,

and property owners in Henry County, brought this suit against the Department of Offender Rehabilitation (DOR) of the State of Georgia, including the commissioner and deputy commissioner thereof; the State Properties Commission, including the Governor, who is the chairman thereof; the Henry County Board of Commissioners; and the County Attorney for Henry County. The complaint states that the various governmental officials are being sued individually and in their official capacities.

The plaintiffs object to the construction of two state prisons, which will be located in the unincorporated area of Henry County in the Henry County Residential-Industrial Park.

The course of events leading to the decision to construct the prisons in Henry County is as follows:

In January of 1978, the General Assembly appropriated funds for the planning and land acquisition for two new penal institutions in the Atlanta area. Supplemental Appropriations Act for the fiscal year 1977-78 (Ga. L. 1978, pp. 10, 140).

In May of 1978, DOR began considering Henry County as a possible site for one of these prisons. The county attorney, on behalf of himself and others, began purchasing property in the Henry County Residential/Industrial Park, and he later executed options to purchase a 50-acre and a 30-acre tract to the Deputy Commissioner of DOR on behalf of the commissioner.

On May 25, 1978, the Henry County Board of Commissioners passed a resolution approving construction of a minimum security prison in the residential/industrial park. This resolution was passed at a special meeting without notice to the public. After news of the plans to construct a state prison in Henry County was released, many of the residents of Henry County voiced objections. The McDonough City Council, on June 5, 1978, adopted a resolution that the county board of commissioners submit the question to a public referendum. Subsequently, the county commission rescinded its prior approval of the construction of the prison and recommended that the question be submitted

# CHAPTER 2

# CRIMINAL LIABILITY

## Article 1
## Culpability

Sec.
16-2-1. "Crime" defined.
16-2-2. Effect of misfortune or accident on guilt.
16-2-3. Presumption of sound mind and discretion.
16-2-4. Acts of person of sound mind and discretion — Presumption of willfulness.
16-2-5. Same — Consequences presumed to be intended.
16-2-6. Intention a question of fact.

## Article 2
## Parties to Crimes

16-2-20. When a person is a party to a crime.
16-2-21. Prosecution of parties who did not directly commit the crime.
16-2-22. Criminal responsibility of corporations.

## ARTICLE 1
## CULPABILITY

### 16-2-1. "Crime" defined.

A "crime" is a violation of a statute of this state in which there is a joint operation of an act or omission to act and intention or criminal negligence. (Laws 1833, Cobb's 1851 Digest, p. 779; Code 1863, § 4188; Code 1868, § 4227; Code 1873, § 4292; Code 1882, § 4292; Penal Code 1895, § 31; Penal Code 1910, § 31; Code 1933, § 26-201; Code 1933, § 26-601, enacted by Ga. L. 1968, p. 1249, § 1.)

JUDICIAL DECISIONS

Analysis

General Consideration
Intent
Criminal Negligence
Decisions Under Prior Law

#### General Consideration

**Every crime consists in union or joint operation of act and intention.** Malbrue v. State, 119 Ga. App. 21, 165 S.E.2d 870 (1968).

**Indictment need not specify statute drawn under since offense charged shall be determined by allegations.** Turner v. State, 233 Ga. 538, 212 S.E.2d 370 (1975).

In order to charge statutory offenses, indictments are not constitutionally required to refer to statute. Turner v. State, 233 Ga. 538, 212 S.E.2d 370 (1975).

**Failure to charge in exact language of section is not error** where court fully instructs on essential elements of crime

v. State, 138 Ga. App. 306, 226 S.E.2d 102 (1976); Scott v. State, 239 Ga. 46, 235 S.E.2d 522 (1977); Washington v. State, 142 Ga. App. 631, 236 S.E.2d 837 (1977); Lunsford v. State, 145 Ga. App. 446, 243 S.E.2d 655 (1978); Harris v. State, 145 Ga. App. 675, 244 S.E.2d 620 (1978); Borgh v. State, 146 Ga. App. 649, 247 S.E.2d 137 (1978); Tucker v. State, 245 Ga. 68, 263 S.E.2d 109 (1980); Rowell v. State, 152 Ga. App. 633, 263 S.E.2d 689 (1979); Moore v. State, 245 Ga. 180, 263 S.E.2d 916 (1980); Pearock v. State, 151 Ga. App. 201, 267 S.E.2d 807 (1980); Thrift-Mart, Inc. v. Commercial Union Assurance Cos., 154 Ga. App. 344, 268 S.E.2d 397 (1980).

**Decisions Under Prior Law**

**Editor's note.** — In light of the similarity of the issues involved, decisions under former Code 1933, § 26-202, as it read prior to revision of title by Ga. L. 1968, p. 1249, are included in the annotations for this section.

**Intent manifested by circumstances connected with perpetration of offense.** — Every crime consists in union or joint operation of act and intention. Sometimes intention can be proved, sometimes it can only be inferred or presumed; and general rule is that intention will be manifested by circumstances connected with perpetration of offense. Marzetta v. Steinman, 117 Ga. App. 471, 160 S.E.2d 590 (1968).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 29 Am. Jur. 2d, Evidence, § 291.

**C.J.S.** — 22 C.J.S., Criminal Law, § 35.

**ALR.** — Homicide: burden of proof on defense that killing was accidental, 63 A.L.R.3d 906.

## 16-2-6. Intention a question of fact.

A person will not be presumed to act with criminal intention but the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted. (Laws 1833, Cobb's 1851 Digest, p. 779; Code 1863, § 4189; Code 1868, § 4228; Code 1873, § 4298; Code 1882, § 4293; Penal Code 1895, § 32; Penal Code 1910, § 32; Code 1933, § 26-202; Code 1933, § 26-605, enacted by Ga. L. 1968, p. 1249, § 1.)

**JUDICIAL DECISIONS**

Analysis

General Consideration
Applications
Decisions Under Prior Law

**General Consideration**

**Intent is manifested by circumstances connected with perpetration of offense.** — Every crime consists in union or joint operation of fact and intention. Sometimes intention can be proved, sometimes it can only be inferred or presumed, and general rule is that intention will be manifested by circumstances connected with perpetration

criminal intent if she intended to do act which Legislature prohibited. Wilson v. State, 57 Ga. App. 839, 197 S.E. 48 (1938).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 29 Am. Jur. 2d, Evidence, §§ 202-204, 366. 75 Am. Jur. 2d, Trial, § 424.

**C.J.S.** — 22 C.J.S., Criminal Law, §§ 31(1), 33, 34.

**ALR.** — Criminal responsibility of one who acts as decoy to detect commission of crime, 120 ALR 1506.

Series of takings over a period of time as involving single or separate larcenies, 33 ALR3d 398.

Homicide; burden of proof on defense that killing was accidental, 63 ALR3d 936.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense, 88 ALR3d 8.

Robbery, attempted robbery, or assault to commit robbery, as affected by intent to collect or secure debt or claim, 88 ALR3d 1309.

## ARTICLE 2

## PARTIES TO CRIMES

### RESEARCH REFERENCES

**ALR.** — Criminal responsibility of one who acts as decoy to detect commission of crime, 120 ALR 1506.

Mental or emotional condition as diminishing responsibility for crime, 22 ALR3d 1228.

### 16-2-20. When a person is a party to a crime.

(a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.

(b) A person is concerned in the commission of a crime only if he:

(1) Directly commits the crime;

(2) Intentionally causes some other person to commit the crime under such circumstances that the other person is not guilty of any crime either in fact or because of legal incapacity;

(3) Intentionally aids or abets in the commission of the crime; or

(4) Intentionally advises, encourages, hires, counsels, or procures another to commit the crime. (Code 1933, § 26-801, enacted by Ga. L. 1968, p. 1249, § 1.)

**Law reviews.** — For note discussing organized crime in Georgia with respect to the application of state gambling laws, and suggesting proposals for combatting organized crime, see 7 Ga. St. B.J. 124 (1970). For note discussing the felony murder rule,

## RESEARCH REFERENCES

**ALR.** — What amounts to participation in homicide on part of one not the actual perpetrator, who was present without preconcert or conspiracy, 12 ALR 275.

Homicide as affected by time elapsing between wound and death, 20 ALR 1006, 93 ALR 1470.

Criminal responsibility of peace officers for killing or wounding one whom they wished to investigate or identify, 61 ALR 321.

Suicide or attempt to commit suicide as a criminal offense or as an unlawful act, 92 ALR 1180.

Homicide or assault in connection with negligent operation of automobile or its use for unlawful purpose or in violation of law, 99 ALR 756.

Admissibility on issue of self-defense (or defense of another), on prosecution for homicide or assault, of evidence of specific acts of violence by deceased, or person assaulted, against others than defendant, 121 ALR 380.

Inference of malice or intent to kill where killing is by blow without weapon, 22 ALR2d 854.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary, 28 ALR2d 857.

Homicide by fright or shock, 47 ALR2d 1072.

Homicide by juvenile as within jurisdiction of a juvenile court, 48 ALR2d 663.

Admissibility and propriety, in homicide prosecution, of evidence as to deceased's spouse and children, 67 ALR2d 731.

Necessity that trial court charge upon malice in homicide case, 71 ALR2d 1025.

Applicability of criminal "hit-and-run" statute to accidents occurring on private property, 77 ALR2d 1171.

Motor vehicle operator's criminal responsibility for homicide where he and deceased were racing, though accused's car was not otherwise involved in the collision or incident, 82 ALR2d 463.

Corporation's criminal liability for homicide, 83 ALR2d 1117.

Homicide: presumption of deliberation or premeditation from the fact of killing, 86 ALR2d 656.

Homicide: failure to provide medical or surgical attention, 100 ALR2d 483.

Homicide: liability where death immediately results from treatment or mistreatment of injury inflicted by defendant, 100 ALR2d 760.

Insulting words as provocation of homicide or as reducing the degree thereof, 2 ALR3d 1292.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide, 11 ALR3d 834.

Unintentional killing of or injury to third person during attempted self-defense, 55 ALR3d 620.

Homicide as affected by lapse of time between injury and death, 60 ALR3d 1323.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death, 65 ALR3d 283.

Proof of live birth in prosecution for killing newborn child, 65 ALR3d 413.

What constitutes "imminently dangerous" act within homicide statute, 67 ALR3d 900.

Degree of homicide as affected by accused's religious or occult belief in harmlessness of ceremonial or simulative acts directly causing fatal injury, 78 ALR3d 1132.

### 16-5-1. Murder; felony murder.

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances

capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

(c) A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.

(d) A person convicted of the offense of murder shall be punished by death or by imprisonment for life. (Laws 1833, Cobb's 1851 Digest, p. 783; Code 1863, § 4217; Code 1868, § 4254; Code 1873, § 4320; Code 1882, § 4320; Penal Code 1895, § 60; Penal Code 1910, § 60; Code 1933, § 26-1002; Code 1933, § 26-1101, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — As to time limitation on prosecution for murder, see § 17-3-1. As to denial of right of murderer to inherit from victim, see § 53-4-6.

**Law reviews.** — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 489 (1969).

For note discussing the felony murder rule, and proposing legislation to place limitations on Georgia's felony murder statute, see 9 Ga. St. B.J. 462 (1973).

For comment on Battle v. State, 37 Ga. App. 154, 139 S.E. 159 (1927), see 1 Ga. B.J. 51 (1927). For comment on Spunger v. State, 37 Ga. App. 154, 139 S.E. 159 (1927), see 1 Ga. B.J. 71 (1927). For comment on Head v. State, 68 Ga. App. 739, 24 S.E.2d 145 (1943), holding year and a day rule applicable in Georgia as a matter of procedure and evidence, see 9 Ga. B.J. 320 (1947). For comment on Gaines v. Wolcott, 119 Ga. App. 313, 167 S.E.2d 366 (1969), see 21 Mercer L. Rev. 325 (1969). For comment on Baker v. State, 236 Ga. 751, 225 S.E.2d 269 (1976), see 28 Mercer L. Rev. 371 (1976).

## JUDICIAL DECISIONS

### Analysis

General Considerations
Unlawfulness
Intent and Malice
1. In General
2. Implied Malice
3. Presumption and Burden of Proof
Felony Murder
1. In General
2. Underlying Felony
3. Termination of Underlying Felony
Death Penalty
Application
Decisions Under Prior Law
1. In General
2. Intent
3. Malice
4. Motive

# CHAPTER 6

# SEXUAL OFFENSES*


Sec.
16-6-1. Rape.
16-6-2. Sodomy; aggravated sodomy.
16-6-3. Statutory rape.
16-6-4. Child molestation.
16-6-5. Enticing a child for indecent purposes.
16-6-6. Bestiality.
16-6-7. Necrophilia.
16-6-8. Public indecency.
16-6-9. Prostitution.
16-6-10. Keeping a place of prostitution.
16-6-11. Pimping.
16-6-12. Pandering.
16-6-13. Penalties for violating Code Sections 16-6-9 through 16-6-12.
16-6-14. Pandering by compulsion.
16-6-15. Solicitation of sodomy.
16-6-16. Masturbation for hire.
16-6-17. Giving of massages in place used for lewdness, prostitution, etc.
16-6-18. Fornication.
16-6-19. Adultery.
16-6-20. Bigamy.
16-6-21. Marrying a bigamist.
16-6-22. Incest.
16-6-23. Publication of name or identity of female raped or assaulted with intent to commit rape.
16-6-24. Adoption of ordinances by counties and municipalities which prescribe loitering or related activities.


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**Cross references.** — As to maintenance by clerk of superior court of records of convictions for sexual offenses, see § 15-6-71. As to obscenity and related offenses, see § 16-12-80 et seq.

**Law reviews.** — For article surveying legislative and judicial developments in Georgia local government law for 1978-79, see 31 Mercer L. Rev. 155 (1979).

## JUDICIAL DECISIONS

**In crimes involving sexual offenses, evidence of similar previous transactions is admissible** to show the lustful disposition of the defendant and to corroborate the testimony of the victim as to the act charged. Fritz v. State, 154 Ga. App. 371, 269 S.E.2d 73 (1980).

Cited in Giles v. State, 143 Ga. App. 358, 239 S.E.2d 168 (1977); City of Atlanta v. McCary, 245 Ga. 382, 266 S.E.2d 193 (1980).

## RESEARCH REFERENCES

**ALR.** — Subsequent marriage as bar to prosecution for rape, 9 ALR 339.

Civil liability for carnal knowledge with actual consent of girl under age of consent, 79 ALR 1229.

Former acquittal or conviction under indictment or other information for rape or other sexual offense which does not allege that female was under age of consent as bar to subsequent prosecution under indictment or information which alleges that she was under age of consent; and vice versa, 119 ALR 1295.

Admissibility, in prosecution for sexual offense, of evidence of other similar offenses, 167 ALR 505, 77 ALR2d 841.

Indecent proposal to woman as assault, 12 ALR2d 971.

Statutes relating to sexual psychopaths, 21 ALR2d 350.

Validity and construction of statute or ordinance forbidding treatment in health

clubs or massage salons by persons of the opposite sex, 51 ALR3d 936.

Antagonistic defenses as ground for separate trials of codefendants in criminal case, 82 ALR3d 245.

Propriety of publishing identity of sexual assault victim, 86 ALR3d 80.

What constitutes offense of "sexual battery," 87 ALR3d 1250.

Remoteness in time of other similar offenses committed by accused as affecting admissibility of evidence thereof in prosecution for sex offense, 88 ALR3d 8.

Time element as affecting admissibility of statement or complaint made in victim of sex crime as res gestae, spontaneous exclamation, or excited utterance, 89 ALR3d 102.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 ALR3d 866.

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in state criminal proceedings, 95 ALR3d 280.

Admissibility, weight, and sufficiency of blood-grouping tests in criminal cases, 2 ALR4th 500.

## 16-6-1. Rape.

(a) A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ.

(b) A person convicted of the offense of rape shall be punished by death, by imprisonment for life, or by imprisonment for not less than one nor more than 20 years. (Laws 1833, Cobb's 1851 Digest, p. 787; Code 1863, §§ 4248, 4249; Ga. L. 1866, p. 151, § 1; Code 1868, §§ 4283, 4284; Code 1873, §§ 4349, 4350; Code 1882, §§ 4349, 4350; Penal Code 1895, §§ 93, 94; Penal Code 1910, §§ 93, 94; Code 1933, §§ 26-1301, 26-1302; Ga. L. 1960, p. 266, § 1; Code 1933, § 26-2001, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1978, p. 3, § 1.)

**Cross references.** — As to time limitation on prosecution for crimes punishable by death or life imprisonment, see § 17-3-1. As to admissibility of evidence relating to the past sexual behavior of the complaining witness in a prosecution for rape, see § 24-2-3.

**Code commission note.** — Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), held that imposition of the death penalty for rape where the victim is not killed is in violation of the Eighth Amendment. Eberhart v. Georgia, 433 U.S. 917, 97 S. Ct. 2994, 53 L. Ed. 2d 1104 (1977), citing Coker, held the death penalty for kidnapping where the victim is not killed to be in violation of the Eighth Amendment. The Supreme Court of Georgia in Collins v. State, 239 Ga. 400, 238 S.E.2d 379 (1977) held that the rationale of Coker must be applied also to kidnapping.

**Law reviews.** — For article, "The Demise of the Corroboration Requirement — Its History in Georgia Rape Law," see 26 Emory L.J. 805 (1977).

For note proposing Rheal Grouping Test Act to expand admissible evidence in paternity proceedings, see 1 Mercer L. Rev. 286 (1950).

For comment on Lamb v. State, 231 Ga. 550, 203 S.E.2d 221 (1974), appearing below, see 8 Ga. L. Rev. 923 (1974).

RESEARCH REFERENCES

**A.L.R.** — What amounts to participation in homicide on part of one not the actual perpetrator, who was present without previous or contemporaneous, 12 A.L.R. 275.

Homicide as affected by time elapsing between wound and death, 20 A.L.R. [illegible] 93 A.L.R. 1470.

Criminal responsibility of peace officers for killing or wounding one whom they wished to investigate or identify, 93 A.L.R. 321.

Suicide or attempt to commit suicide as criminal offense or as an unlawful act, 97 A.L.R. 1180.

Homicide or assault in connection with negligent operation of automobile or motor for unlawful purpose or in violation of law, 99 A.L.R. 736.

Admissibility on issue of self-defense (or defense of another), on prosecution for homicide or assault, of evidence of specific acts of violence by deceased, or person assaulted, against others than defendant, 124 A.L.R. 386.

Inference of malice or intent to kill where killing is by blow without weapon, 22 A.L.R.2d 874.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to insurance policies on life of deceased naming accused as beneficiary, 28 A.L.R.2d 857.

Homicide by fright or shock, 47 A.L.R.2d 1072.

Homicide in juvenile as within jurisdiction of a juvenile court, 48 A.L.R.2d 663.

Admissibility and propriety, in homicide prosecution, of evidence as to deceased's spouse and children, 67 A.L.R.2d 734.

Necessity that trial court charge upon malice in homicide case, 71 A.L.R.2d 1025.

Applicability of criminal "hit-and-run" statute to accidents occurring on private property, 77 A.L.R.2d 1171.

Motor vehicle operator's criminal responsibility for homicide where deceased were racing, though he neither was nor otherwise involved in the collision or accident, 82 A.L.R.2d 654.

Corporation's criminal liability for homicide, 83 A.L.R.2d 1137.

Homicide: presumption of death as to presumption from the fact of killing, 86 A.L.R.2d 1081.

Homicide: failure to provide medical or surgical attention, 100 A.L.R.2d 1384.

Homicide: liability where death immediately results from treatment or nontreatment of injury inflicted by defendant, 100 A.L.R.2d 769.

Speaking words as provocation of homicide or as reducing the degree thereof, 2 A.L.R.3d 1292.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide, 11 A.L.R.3d 934.

Unintentional killing of or injury to other person during attempted self-defense, 35 A.L.R.3d 629.

Homicide as affected by lapse of time between injury and death, 50 A.L.R.3d 1325.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death, 65 A.L.R.3d 283.

Proof of live birth in prosecution for killing newborn child, 65 A.L.R.3d 477.

What constitutes "imminently dangerous" act within homicide statute, 67 A.L.R.3d 986.

Degree of homicide as affected by accused's religious or occult belief; or harmlessness of ceremonial or religious acts directly causing fatal injury, 75 A.L.R.3d 1132.

## 16-5-1. Murder; felony murder.

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances



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capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

(c) A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.

(d) A person convicted of the offense of murder shall be punished by death or by imprisonment for life. (Laws 1833, Cobb's 1851 Digest, p. 783; Code 1863, § 4217; Code 1868, § 4234; Code 1873, § 4320; Code 1882, § 4320; Penal Code 1895, § 60; Penal Code 1910, § 60; Code 1933, § 26-1002; Code 1933, § 26-1101, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — As to time limitation on prosecution for murder, see § 17-3-1. As to denial of right of murderer to inherit from victim, see § 53-4-6.

**Law reviews.** — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969).

For note discussing the felony murder rule, and proposing legislation to place limitations on Georgia's felony murder statute, see 9 Ga. St. B.J. 462 (1973).

For comment on Battle v. State, 37 Ga. App. 134, 139 S.E. 159 (1927), see 1 Ga. B.J. 51 (1927). For comment on Springer v. State, 37 Ga. App. 134, 139 S.E. 159 (1927), see 1 Ga. B.J. 51 (1927). For comment on Head v. State, 68 Ga. App. 739, 24 S.E.2d 145 (1943), holding year and a day rule applicable in Georgia as a matter of procedure and evidence, see 9 Ga. B.J. 320 (1947). For comment on Gaines v. Wolcott, 119 Ga. App. 313, 167 S.E.2d 366 (1969), see 21 Mercer L. Rev. 325 (1969). For comment on Baker v. State, 230 Ga. 754, 225 S.E.2d 269 (1976), see 28 Mercer L. Rev. 371 (1976).

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A.L.R. — What amounts to malice aforethought in homicide on part of one not the actual perpetrator, who was present without precontrivance or conspiracy, 12 A.L.R. 275.

Homicide as affected by time elapsing between wound and death, 20 A.L.R. 1006, 93 A.L.R. 1470.

Criminal responsibility of peace officers for killing or wounding one whom they wished to investigate or abscond, 61 A.L.R. 321.

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Interference of mother or intent to kill stranger killed in blow without weapon, 27 A.L.R.2d 854.

Admissibility in homicide prosecution for purpose of showing motive of evidence as to mental or physical condition of deceased running amuck as heretofore, 28 A.L.R.2d 857.

Homicide by fright or shock, 47 A.L.R.2d 1072.

Homicide by juvenile as within jurisdiction of a juvenile court, 48 A.L.R.2d 693.

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Application of [illegible] statute to accidents occurring on private property, 77 A.L.R.2d 1171.

Motor vehicle operator's criminal responsibility for homicide where he and deceased were racing, though accused's car was not otherwise involved in the collision or accident, 82 A.L.R.2d 464.

Corporation's criminal liability for homicide, 83 A.L.R.2d 1117.

Homicide: presumption of deliberation or premeditation from the fact of killing, 86 A.L.R.2d 630.

Homicide: failure to provide medical or surgical attention, 100 A.L.R.2d 187.

Homicide: liability where death materially results from treatment or nontreatment of person inflicted to deceased, 100 A.L.R.2d 769.

Insulting words as provocation of homicide or as reducing the degree thereof, 2 A.L.R.3d 1292.

Earlier prosecution for offense during which homicide was committed as bar to prosecution for homicide, 11 A.L.R.3d 851.

Unintentional killing of or injury to third person during attempted self-defense, 23 A.L.R.3d 629.

Homicide as affected by lapse of time between injury and death, 60 A.L.R.3d 1423.

Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death, 65 A.L.R.3d 283.

Proof of live birth in prosecution for killing newborn child, 65 A.L.R.3d 1.

What constitutes "instruments dangerous" as weapons in homicide statute, 67 A.L.R.3d 991.

Degree of homicide as affected by accused's religious or moral belief in lawfulness of contemplated or completed act relative to causing fatal injury, 78 A.L.R.3d 1142.

## 16-5-1. Murder; felony murder.

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances



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capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

(c) A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.

(d) A person convicted of the offense of murder shall be punished by death or by imprisonment for life. (Laws 1833, Cobb's 1851 Digest, p. 783; Code 1863, § 4217; Code 1868, § 4234; Code 1873, § 4320; Code 1882, § 4320; Penal Code 1895, § 60; Penal Code 1910, § 60; Code 1933, § 26-1002; Code 1933, § 26-1101, enacted by Ga. L. 1968, p. 1249, § 1.)

**Cross references.** — As to time limitation on prosecution for murder, see § 17-3-1. As to denial of right of murderer to inherit from victim, see § 53-4-6.

**Law reviews.** — For article recommending more consistency in age requirements of laws pertaining to the welfare of minors, see 6 Ga. St. B.J. 189 (1969).

For note discussing the felony murder rule and proposing legislation to place limitations on Georgia's felony murder statute, see 9 Ga. St. B.J. 462 (1973).

For comment on Battle v. State, 37 Ga. App. 154, 139 S.E. 139 (1927), see 1 Ga. B.J. 51 (1927). For comment on Springer v. State, 37 Ga. App. 154, 139 S.E. 139 (1927), see 1 Ga. B.J. 51 (1927). For comment on Bicai v. State, 68 Ga. App. 759, 24 S.E.2d 145 (1943), holding year and a day rule applicable in Georgia as a matter of procedure and evidence, see 9 Ga. B.J. 320 (1947). For comment on Gaines v. Webster, 119 Ga. App. 513, 167 S.E.2d 368 (1969), see 21 Mercer L. Rev. 325 (1969). For comment on Baker v. State, 240 Ga. 751, 227 S.E.2d 269 (1976), see 28 Mercer L. Rev. 371 (1976).

## JUDICIAL DECISIONS

### Analysis

General Consideration
Unlawfulness
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3. Presumption and Burden of Proof
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1. In General
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## ARTICLE 2

## DEATH PENALTY GENERALLY

**Cross references.** — As to constitutional guarantee against deprivation of life without due process, see Ga. Const. 1976, Art. I, Sec. I, Para. I.

**U.S. Code.** — For provision of Federal Rules of Criminal Procedure, Rule 38, relating to the death penalty, and annotations pertaining thereto, see 18 U.S.C.A.

### 17-10-30. Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, § 27-2534.1, enacted by Ga. L. 1973, p. 159, § 3.)

**Cross references.** — As to time limitation on prosecutions for crimes punishable by death, see § 17-3-1. As to presentence hearings in death penalty cases, see § 17-10-2.

**Law reviews.** — For article opposing capital punishment in Georgia, see 15 Ga. St. B.J. 139 (1979). For article supporting capital punishment in Georgia, see 16 Ga. St. B.J. 48 (1979). For article surveying Georgia cases in the area of evidence from June 1979 through May 1980, see 32 Mercer L. Rev. 63 (1980).

For comment analyzing and criticizing the 1973 capital punishment statute in light of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), see 24 Mercer L. Rev. 801 (1973). For comment on Alderman v. State, 241 Ga. 486, 246 S.E.2d 642, cert. denied, 439 U.S. 991, 99 S. Ct. 593, 58 L. Ed. 2d 666 (1978), see 31 Mercer L. Rev. 349 (1979).

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4. Outrageously or Wantonly Vile, Horrible, or Inhuman Circumstances
5. Murder of Peace Officer, Corrections Employee, or Fireman, or for Purpose of Avoiding, Etc., Arrest or Custody

victim in anticipation of physical harm, may amount to serious physical abuse, that is, torture of the victim, and will support a finding of depravity of mind of the defendant. Dampier v. State, 245 Ga. 882, 268 S.E.2d 349 (1980).

**Physical abuse includes sexual abuse** for purposes of proving torture under this section. Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980).

**Serious** sexual abuse may be found to constitute serious physical abuse. Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980); Collins v. State, 246 Ga. 264, 271 S.E.2d 352 (1980).

**When only** facts occurring prior to death are relied upon, the fact that the victim was tortured will support a finding of depravity of mind. Brooks v. State, 246 Ga. 262, 271 S.E.2d 172 (1980).

**Serious physical abuse before death authorizes jury finding under this provision.** — Where evidence demonstrated that the victim suffered serious physical abuse prior to death, the jury is authorized to find that beyond a reasonable doubt the appellant's murder of the victim was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery. Hamilton v. State, 246 Ga. 264, 271 S.E.2d 173 (1980).

**Defendant convicted of two capital felonies can receive death penalty for both under this provision.** Johnson v. State, 242 Ga. 619, 250 S.E.2d 391 (1978).

**Where after raping, robbing, and binding victim, defendant put a bullet through victim's head,** the sentence of death imposed is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

### 5. Murder of Peace Officer, Corrections Employee, or Fireman, or for Purpose of Avoiding, etc., Arrest or Custody

**Murders to prevent arrest and against peace officer in performing duties not necessarily identical.** — Murder committed for the purpose of preventing a lawful arrest and murder committed against a peace officer while engaged in the performance of his official duties are not necessarily identical, and therefore do not fall within the inclusion provisions of §§ 16-5-6 and 16-5-7, as these sections do not apply to aggravating circumstances but to crimes. Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 21 Am. Jur. 2d, Criminal Law, §§ 583-585.

**C.J.S.** — 21 C.J.S., Criminal Law, § 1558. 24B C.J.S., Criminal Law, §§ 1980-1983, 1991, 2001-2005.

**ALR.** — Constitutionality of statute which makes specified punishment or penalty mandatory and permits no exercise of discretion on part of court or jury, 83 ALR 1302.

Furnishing or reading instructions to jury, in jury room, after retirement, as error, 96 ALR 899.

Propriety and prejudicial effect of sending written instructions with retiring jury in criminal case, 91 ALR3d 302.

## 17-10-31. Requirement of jury finding of aggravating circumstance and recommendation that death penalty be imposed prior to imposition of death sentence.

Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a

recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. This Code section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty. (Code 1933, § 26-3102, enacted by Ga. L. 1968, p. 1249, § 1; Ga. L. 1969, p. 809, § 1; Ga. L. 1973, p. 159, § 7.)

**Cross references.** — For further provisions regarding recommendations for imposition of death sentence, see § 17-9-3.

**Law reviews.** — For article, "Jury Sentencing in Georgia — Time for a Change?," see 5 Ga. St. B.J. 421 (1969).

For note raising chilling effect on defendant's constitutional rights posed by this section prior to its 1973 amendment, in light of United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), see 20 Mercer L. Rev. 309 (1969).

## JUDICIAL DECISIONS

**Section applies to sentencing hearing only.** — Both this section and § 17-10-2 apply only to the sentencing phase of a capital case after conviction. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

**Jury need not find any mitigating circumstance in order to make recommendation of mercy that is binding on the trial court.** Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

**But it must find statutory aggravating circumstance before recommending sentence of death.** Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

**In jury cases, trial judge is bound by jury's recommended sentence.** Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

**Judge must impose lesser punishment where jury cannot agree.** — The jury that convicted must also impose the sentence. Where only two sentences can be imposed, life imprisonment or death, if the convicting jury is unable to agree on which of those two sentences to impose, the trial judge must impose the lesser, life imprisonment. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

**Instruction as to requirements of section not impermissible expression of opinion.** — There is no impermissible expression of opinion where the trial court instructs the jury that the defendant cannot be sentenced to death unless the jury finds at least one statutory aggravating circumstance to exist beyond a reasonable doubt and recommends that the death penalty be imposed. Finney v. State, 242 Ga. 582, 250 S.E.2d 388 (1978), cert. denied, 441 U.S. 916, 99 S. Ct. 2017, 60 L. Ed. 2d 388 (1979).

**Retrial as to sentencing where sentence reversed for error.** — A new trial on the sentence can be held before a new jury where the jury that convicted the accused also sentenced him to death and the sentence was reversed on appeal because of some error that infected the sentence. In such a situation, there can be a remand for a new trial as to the sentence only. Miller v. State, 237 Ga. 557, 229 S.E.2d 376 (1976).

Cited in Pass v. State, 227 Ga. 730, 182 S.E.2d 779 (1971); Coker v. Georgia, 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977); House v. Stynchcombe, 239 Ga. 222, 236 S.E.2d 353 (1977); Thomas v. State, 240 Ga. 393, 242 S.E.2d 1 (1977); Mendenhall v. Hopper, 452 F. Supp. 977 (S.D. Ga. 1978); Bowen v. State, 244 Ga. 495, 260 S.E.2d 853 (1979).

NO. 82-5877

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHNNIE L. JOHNSON,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC &
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

# BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1.

Whether the Supreme Court of Georgia properly determined that the imposition of the death penalty in Petitioner's case was not excessive or disproportionate under the facts of this case?

2.

Whether the Supreme Court of Georgia properly determined that the jury was not improperly precluded from the consideration of any mitigating factors during the sentencing phase of Petitioner's trial, either by the failure to admit available mitigating factors, or by the trial court's instructions to the jury?

3.

Whether the Supreme Court of Georgia properly performed its statutory duty and determined that the sentence of death imposed upon the Petitioner was not excessive or disproportionate to the penalty imposed in similar cases?

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# BRIEF FOR THE RESPONDENT IN OPPOSITION

## PART ONE

## STATEMENT OF FACTS

Petitioner, Johnnie L. Johnson, along with his codefendant Jerry Sprouse, was indicted in the Superior Court of Chatham County on July 21, 1974, for the murder, rape and kidnapping of Suzanne Edenfield and the kidnapping and aggravated assault of Mary Lynn Harrod.

Following a separate jury trial, Petitioner was found guilty on all charges and received a twenty year sentence for kidnapping, a ten year sentence for aggravated assault, a sentence of life imprisonment for rape and a sentence of death for murder. A motion for new trial was filed on August 6, 1975 and amended on March 13, 1978, but was denied on March 14, 1978.

Petitioner's convictions and sentences, including his sentence of death, were upheld on direct appeal to the Supreme Court of Georgia in Johnson v. State, 242 Ga. 649, 250 S.E.2d 394 (1978). Petitioner also filed an extraordinary motion for extraordinary relief which was denied in the Superior Court of Chatham County and upheld on appeal to the Supreme Court of Georgia in Johnson v. State, 246 Ga. 474, 271 S.E.2d 789 (1980).

Petitioner filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, on July 20, 1981 and an amendment was filed on September 3, 1981. An evidentiary hearing was conducted on January 7, 1982 in the Superior Court of Butts County, at which time Petitioner was represented by counsel. On March 25, 1982, the Superior Court of Butts County, Georgia, denied Petitioner's petition for a writ of habeas corpus. A timely notice of appeal was filed and the Supreme Court of Georgia granted Petitioner's application for a certificate of probable cause to appeal on May 19, 1982.

Following the filing of briefs and the holding of oral argument in the Supreme Court of Georgia, that court affirmed the decision of the habeas corpus court denying the Petitioner the relief sought in Johnson v. Zant, 249 Ga. 812 ___ S.E.2d ___ (1982). This petition for a writ of certiorari seeks a review of that judgment of the Supreme Court of Georgia.

As a review of the facts presented at Petitioner's trial is necessary for this Court's determination of whether or not a petition for a writ of certiorari should be granted, a summary of the evidence admitted at Petitioner's trial is presented at this time for this purpose.

On July 20, 1974, Suzanne Edenfield and her sister, Becky, picked up Mary Lynn Harrod at her home, on their

way to a rock concert in Savannah, Georgia. After the concert, Suzanne dropped her sister off at home and she and Lynn drove in her Volkswagen toward Victory Drive in Savannah, Georgia, stopping along the way at a "7-11" convenience store.

As the girls pulled onto Victory Drive, a cream colored car, containing the Petitioner and his codefendant, Jerry Sprouse, pulled up on the passenger's side of the Volkswagen. Petitioner, who was driving the car told the girls that he and his friend were not from Savannah and asked where they could go to have a good time. (T. 45).[1] Lynn replied that she did not know where they could go and Petitioner then asked them if they wanted to stop and smoke a joint. (T. 46). When the girls agreed, Petitioner and Sprouse followed the girls and parked in front of Savannah High School. (T. 46). They all stopped and got out of the car, sat down in the park, and listened to tapes on Johnson's car tape player. They smoked two or three marijuana joints between them, for approximately fifteen minutes. (T. 48-49).

After about fifteen minutes, Suzanne and Lynn got up to leave and told the men they would see them later. They got in Suzanne's car and cranked it, when all of a sudden, Sprouse opened the car door on the driver's side. (T. 50-51). Sprouse had a gun that he had taken from the trunk of Petitioner's car and he ordered the girls to get into the Petitioner's car. (T. 51; 198-199). Sprouse sat in the backseat of the Petitioner's car, with Lynn in the middle and Suzanne on the driver's side, while Petitioner drove. Sprouse made Lynn put her head in Suzanne's lap. (T. 52). Lynn asked where they were going and one of the

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[1]References to the transcript of Petitioner's trial will be designated by "T", followed by the appropriate page number

men replied that the "big man", had seen them at the concert and wanted to talk to them. When Lynn asked who the "big man" was, they replied that she would find out when they got where they were going. (T. 54).

Petitioner gave Suzanne something to tie around Lynn's mouth, but when it wouldn't work, Petitioner stopped the car, got out and took something from the trunk and tied it around Suzanne's mouth. (T. 55). Suzanne was having trouble breathing through her mouth and Johnson told her that he would take off the gag, but "if she made any noise that he would kill her." (T. 55).

Petitioner and Sprouse tied the girls' hands up and told them to put their hands down as they started the car again and began driving until they reached a wooded area. (T. 56-57).

Petitioner stopped the car and got out, taking Suzanne and going up to the front of the car. (T. 57). Sprouse took off Lynn's halter top and pants and attempted to have intercourse with her. (T. 58-59). However, he did not succeed and got out of the car on the right side, when Petitioner and Suzanne returned to the car. (T. 60). Suzanne got back in the car with her hands still tied behind her back, and with her pants on, but without her top. She stated to Lynn that Johnson had raped her and that she thought that Johnson and Sprouse were serious, so do what they said. (T. 60).

Sprouse told the girls to get out of the backseat of the car and Johnson removed Suzanne's bluejeans. (T. 61). They told Suzanne and Lynn to stand off the side of the road. (T. 62). Petitioner and Sprouse stood in front of them, but Petitioner got in the car and turned it around. He then got out of the car and stood beside Sprouse. (T. 63). Lynn Harrod was uncertain as to which man had the gun at this time. Lynn did not hear anything

said between Petitioner and Sprouse and the next thing she heard was a gunshot. She turned around and saw Suzanne falling backwards to the ground. (T. 64). Then she heard the second shot which hit her and made her fall face down to the ground. (T. 65).

The next thing Lynn knew she was attempting to get up, with her hands still tied. (T. 65). She saw Suzanne lying on her back, with her hands still tied. Lynn got up and ran toward the house to get help. She knocked on the door and told the woman inside that she and her friend had been shot. The next door neighbors called the police. (T. 67-69).

At trial, Petitioner himself described the way in which he and Sprouse disposed of the gun and the girls' clothes. (T. 207). He stated that although he considered going to the police, he was scared and that when he and Sprouse returned to Beaufort, South Carolina, from Savannah, they then decided to run to Canada. (T. 208-210). Petitioner described how he and Sprouse had burned the car, prior to leaving for Canada (T. 209), and how they had returned to Suzanne's Volkswagen and wiped the fingerprints off of the car. (T. 236). Further facts will be discussed as is necessary for consideration by this Court in determining whether a petition for a writ of certiorari should be granted.

## PART TWO

## REASONS FOR NOT GRANTING THE WRIT

I. THE SUPREME COURT OF GEORGIA PROPERLY APPLIED THIS COURT'S DECISION IN ENMUND V. FLORIDA, ___ U.S. ___, 102 S.Ct. 3368 (1982), IN DETERMINING THAT THE IMPOSITION OF A DEATH SENTENCE IN PETITIONER'S CASE WAS NOT EXCESSIVE, DISPROPORTIONATE OR ARBITRARY, SO AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OR THE APPROPRIATE PROVISIONS OF THE CONSTITUTION OF GEORGIA.

Petitioner contends that the Supreme Court of Georgia, in reviewing the denial of Petitioner's petition for a writ of habeas corpus, improperly applied the decision of this Court in Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368 (1982), in finding that the imposition of the death penalty upon Petitioner was not excessive or disproportionate under the facts of this case.

It is interesting to note that on direct appeal to the Supreme Court of Georgia, immediately following Petitioner's convictions and sentences, the Supreme Court of Georgia concluded, "after reviewing the record, we conclude that the evidence presented at trial fully authorized the jury in finding that Johnson and Sprouse were equally involved in the commission of these crimes." Johnson v. State, 242 Ga. 649, 650, 250 S.E.2d 394 (1978).

In the sentence review portion of the Supreme Court of Georgia's opinion on direct appeal, the court found that

the sentence of death was not excessive or disproportionate to the penalty imposed in similar cases. Id. at 656. However, in light of the decision of this Court in Enmund v. Florida, supra, the Supreme Court of Georgia reviewed the issue of disproportionality and excessiveness of the death penalty, in Petitioner's appeal from the denial of state habeas corpus relief.

Petitioner argues that in analyzing this issue under the principles set forth by this Court in Enmund v. Florida, supra, that the Supreme Court of Georgia did not focus on the factors appropriate for consideration of the issue of disproportionality, as outlined in this Court's decision. Petitioner contends that the focus of the determination should be whether Petitioner attempted to kill or intended to kill the victims. In its opinion, the Supreme Court of Georgia specifically focused on this particular language from Enmund v. Florida, supra, and noted that in discussing the facts of the case, this Court had noted that "'Enmund himself did not kill or attempt to kill . . . the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder.'" Johnson v. Zant, 249 Ga. 812, 816, ___ S.E.2d ___ (1982). Therefore, the Supreme Court of Georgia clearly focused on the appropriate factors for consideration of this issue, as outlined by this Court's decision in Enmund, supra.

However, the Supreme Court of Georgia noted that its interpretation of this Court's decision was not such a narrow one ". . . as to exclude imposition of the death penalty for all but those who fatally wield the murder weapon." Id. at 816. Respondent submits that this was a proper interpretation of this Court's decision and that the Supreme Court of Georgia focused on the appropriate factors in finding that the death penalty had not been

disproportionately imposed, nor was it excessive under the facts of the case.

With respect to the narrow nature of this Court's decision, Respondent respectfully submits that a reading of this Court's decision in Enmund v. Florida, readily indicates the limited nature of the Court's decision. First, Mr. Enmund received the death penalty on the basis of accomplice liability in a felony murder situation. Felony murder was not involved in this case. Additionally, this Court accepted the statistics presented by the Petitioner in Enmund and stated that these statistics showed that of 796 inmates under sentences of death for the offense of homicide, only 16 were not physically present when the fatal assault was committed and of these 16 prisoners, only 3, including Enmund, were sentenced to die without a finding that they hired or solicited someone else to kill the victim or to participate in a scheme designed to kill the victim. Enmund v. Florida, at 3375. Therefore, according to the statistics accepted by this Court, there are arguably only 3 persons on death row, nationwide, who might possibly be affected, at this time, by this Court's decision in Enmund v. Florida, supra. As is readily apparent from the previous review of the facts presented at Petitioner's trial, Petitioner was present at the time of the murder, with the only dispute being over the person who actually acted as the triggerman at the time of the murder.

Respondent asserts that the Supreme Court of Georgia correctly found that the facts in this case were "substantially dissimilar" from the facts presented to the court in Enmund. The evidence established that Petitioner drove the car at the time there was initial contact with the victim; that the gun utilized in the commission of the crimes was kept in the trunk of Petitioner's car; that

Petitioner got something out of the trunk to use as a gag for Suzanne Edenfield, told Ms. Edenfield that if she made any noise he would kill her; participated in tying the girls' hands up and ordering them to keep their heads down while Petitioner drove into a wooded area; raped Suzanne Edenfield; turned the car around; disposed of the gun and the girls' clothes; burned the car that was utilized during the crime and wiped fingerprints off of the car of the one of the victims. As already noted, the surviving victim, Lynn Harrod, was uncertain as to whether Petitioner or Sprouse had the gun at the time that she and Suzanne Edenfield were shot. (T. 63-64).

From this evidence, as well as other evidence to which the court pointed in its opinion, the Supreme Court of Georgia concluded that, "Johnson was not only present but active and participating throughout the commission of the crimes for which he is convicted, including the murder." Johnson v. Zant, 249 Ga. 812, 817, ___ S.E.2d ___ (1982). Therefore, Respondent contends that, contrary to the assertions of the Petitioner, that the Supreme Court of Georgia did properly focus on the facts enunciated by this Court in Enmund, for determining whether or not the imposition of the death penalty was excessive or disproportionate in this case. Respondent respectfully takes exception to the assertion of the Petitioner that the ultimate decision to murder the victims was solely the decision of codefendant Sprouse. Respondent also asserts that there is no support for this in the record of Petitioner's trial, but rather, that the active participation of the Petitioner in all of the events and his presence only a few feet from the victim prior to her murder, establishes Petitioner's direct participation in all of the crimes for which he was convicted.

Respondent also takes exception to the assertion of the Petitioner that the Supreme Court of Georgia did not give the culpability of the Petitioner individual consideration as required by this Court's decisions in Enmund, supra, and in Coker v. Georgia, 443 U.S. 584 (1977) and Lockett v. Ohio, 438 U.S. 586 (1978). Respondent respectfully submits that a fair reading of the decision of the Supreme Court of Georgia indicates that the court properly focused on the activities of the Petitioner, as opposed to that of his codefendant and differentiated between their participation in various aspects of the crime. Sprouse's actions were not imputed to Johnson, but rather, the evidence established that both of the men were active participants in the crime, although having varying roles at different points in time.

Petitioner asserts that he could not anticipate Sprouse's use of deadly force, but it has not even been established who utilized the final deadly force against the murder victim. Unlike Enmund, Petitioner was not only involved in similar activity prior to the crime and in the concealment phase of the crime, but was also involved throughout the entire criminal transaction and was physically present at the time of the murder of the victim, and participated to some degree in her death. Respondent submits that the Supreme Court of Georgia did make precise and consistent fact findings which were supported by the record and that Petitioner is attempting to minimize his role in the crimes, which was firmly established by the evidence presented by the prosecution.

For all of these reasons, Respondent respectfully submits that the Supreme Court of Georgia properly dealt with this issue and that there is nothing presented for the review of this Court.

## II. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE SENTENCING JURY WAS NOT UNCONSTITUTIONALLY PREVENTED FROM CONSIDERING MITIGATING FACTORS.

Petitioner contends that his Eighth and Fourteenth Amendment rights under the Constitution of the United States were violated because the sentencer was precluded from properly focusing on Petitioner's own conduct. First, Petitioner argues, for the first time in this petition for a writ of certiorari, that the jury was instructed on several theories of liability, but no findings as to the liability of the Petitioner were required to be made by the jury or were in fact made by the jury. Petitioner admits that the jury at Petitioner's trial was instructed on several theories of liability, including aiding and abetting, malice murder and felony murder and Respondent contends that it was for the jury to determine Petitioner's guilt or innocence based on the instructions of the trial judge as a whole. Respondent contends that this issue, raised for the first time on appeal, should not be reviewed by this Court, Cardinale v. Louisiana, 394 U.S. 437 (1969).

However, an examination of this argument indicates that essentially what Petitioner argues is that if the evidence was insufficient to support a death penalty, then the sentence must fall, and this is what has previously been discussed in connection with the first contention raised by Petitioner in this petition for a writ of certiorari. Respondent's position is that the evidence was sufficient for the jury to determine that Petitioner was guilty of direct participation in the murder and other

crimes for which he was convicted and properly determined that the death sentence was appropriate.

Petitioner also claims, as he did in his state habeas corpus petition and on appeal from the Supreme Court of Georgia from the denial of state habeas corpus relief, that the sentencing jury was precluded from considering mitigating factors in particular circumstances of the offense. Petitioner cites this Court's decision in Enmund v. Florida, supra as singling out nine state murder statutes "likely to generate disproporationate death sentences under the analysis of Enmund." If the reference to this Court's decision in Enmund is examined, however, this Court simply recognized that Georgia is one of nine jurisdictions which ". . . authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life." Enmund v. Florida, at 3372. It has already been discussed that the facts of this particular case differentiate it from such a situation, as Petitioner was a direct participant in all of the crimes.

Next, Petitioner claims that the jury at Petitioner's trial did not have before them mitigating evidence to consider Petitioner's conduct and culpability and further that the trial court's charge on mitigating circumstances was improper, as it did not provide the jury with the proper guidance.

It should be noted that the Supreme Court of Georgia observed in connection with Petitioner's claim of ineffective assistance, that Petitioner's trial attorney made a tactical decision not to submit "character evidence", at the sentencing phase of Petitioner's trial, as he knew of no witnesses who would have been helpful. Further, he made a tactical decision not to place his client on the stand, because he had made a poor witness

during the guilt/innocence phase of his trial. Johnson v. Zant, 249 Ga. 812, 813, ___ S.E.2d ___ (1982). Therefore, the jury was not precluded from considering mitigating factors, but rather, counsel made a tactical decision not to place any evidence in mitigation at Petitioner's sentencing phase, in the belief that any available information would not be beneficial.

With respect to the trial court's instructions, the Supreme Court of Georgia concluded that, "the trial court charged properly as to consideration of mitigating circumstances and the option to recommend against death." Johnson v. Zant, 249 Ga. 812, 814, ___ S.E.2d ___ (1982). The trial court properly defined mitigating circumstances as those circumstances, ". . . which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." (T. 267). The jury was properly informed that under Georgia law, they were authorized to consider all of the evidence received in court, if any, in mitigation and aggravation. (T. 267).

To have singled out specific mitigating factors, might have misled the jury into thinking that only those factors enumerated could be considered as mitigating, rather than establishing the fact that any evidence presented to the jury in either phase of the trial, might properly be viewed as mitigating by the jury pursuant to their function as fact finders.

In Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), the court considered whether the trial court's charge on mitigating circumstances was constitutional. In this regard, the United States Court of Appeals for the Fifth Circuit stated that in order to meet the constitutional

requirements of the Eighth and Fourteenth Amendments, that certain basic elements must be present. The court stated:

> In most cases, this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend death . . .

Id. at 471.

A review of the charge as a whole in this case shows that the jury was adequately charged as to the responsibility with reference to mitigating circumstances and their option to recommend a life sentence and the Supreme Court of Georgia so found in concluding that this contention was without merit. Respondent respectfully submits that this issue presents nothing for review by this Court.

## III. THE SUPREME COURT OF GEORGIA PROPERLY FOUND THAT THE SENTENCE OF DEATH IMPOSED AGAINST THE PETITIONER WAS NOT UNCONSTITUTIONAL AS BEING EXCESSIVE OR DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES.

To some extent, Petitioner's third allegation is a restatement of the initial allegation made that the facts and circumstances of Petitioner's case require a finding that the death penalty is excessive and disproportionate, as it cannot be proven that he was the triggerman in the murder. As has already been noted, the Supreme Court of Georgia in reviewing Petitioner's sentence on direct appeal stated, "After reviewing the record, we conclude that the evidence presented at trial fully authorized the jury in finding that Johnson and Sprouse were equally involved in the commission of these crimes." Johnson v. State, 242 Ga. 649, 650, 250 S.E.2d 394 (1978).

Further, in conducting their mandatory sentence review, as required by Georgia law, the court concluded that the sentence of death in Petitioner's case was not imposed under the influence of passion, prejudice or any other arbitrary factor. Johnson v. State, supra, at 655. The court also determined that the evidence supported the aggravating circumstances and determined that the death penalty in this case was not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See Johnson v. State, supra, at 656. An appendix of the cases considered in connection with this contention was listed by the court.

On review of Petitioner's sentence in his appeal from the denial of state habeas corpus relief, the court reaffirmed its earlier holding by stating, "we do not find the sentence of death imposed here to be excessive or disproportionate to the penalty imposed in similar cases." Johnson v. Zant, 249 Ga. 812, 817, ___ S.E.2d ___ (1982).

The proportionality review mandated by Georgia law has been interpreted by the Supreme Court of Georgia to require comparison of the sentence given in a death penalty case, not only with other cases in which the death penalty has been imposed, but also with cases in which penalties of less than death were imposed. For example, in Moore v. State, 233 Ga. 861, 865-866, 213 S.E.2d 829 (1975), cert. denied, 428 U.S. 910, death sentence vacated sub nom, Moore v. Balkcom, 513 F.Supp. 772 (S.D. Ga. 1981), the court stated:

> [W]e view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not 'wantonly or freakishly imposed' as stated by Justice Stewart in his concurring opinion in the Furman and Jackson cases.

(408 U.S. 238, 310), supra.

The court also stated, ". . . this court is not required to determine that less than a death sentence was never imposed in a case with some similar characteristics." Moore, supra, at 863-864. Finally, under Georgia law, even though a case is

appropriate for the death penalty, the jury may, as an act of mercy, without regard to sentence proportionality, impose a life sentence. Therefore, the efficacy of comparing non-death penalty cases for determining the proportionality of a case in which the death penalty is imposed, is severely limited.

The fact that Petitioner's codefendant, who received a separate trial, had his death penalty reversed because of the exclusion of certain evidence during the sentencing phase and has presently been returned to the trial court for a retrial as to sentence, does not require a finding that the Petitioner, a direct participant in all of the crimes, have his sentence of death vacated as excessive or disproportionate.

The Respondent respectfully submits that the Supreme Court of Georgia performed its statutory duty in determining that the death penalty was not excessive or disproportionate under the facts of this case, as compared to similar cases, and that none of Petitioner's constitutional rights have been violated. Respondent submits that this issue presents nothing for review by this Court.

## CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia, as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief for the Respondent in Opposition upon the Petitioner's attorney by depositing a copy of this Brief in the United States mail with proper address and adequate postage to:

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This 6th day of January, 1983.

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